EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 4302

1477 United States 1405

Circuit Court of Appeals

For the Ninth Circuit.

C. R. HOOPER, Doing Business as HOOPER MANUFACTURING COMPANY, L. H. COOLIDGE and C. V. HULL, Copartners as L. H. COOLIDGE COMPANY, SEATTLE SHIPBUILDING AND DRY DOCK COMPANY, a Corporation, UNION OIL COMPANY OF CALIFORNIA, a Corporation, SEATTLE HARDWARE COMPANY, a Corporation and SAMUEL CLARK,

Appellants,

vs.

KUNKLER TRANSPORTATION COMPANY, a Corporation, and FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Appellees.

Apostles on Appeal.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

NAMES AND ADDRESSES OF COUNSEL.

PHILIP D. MacBRIDE, Esq., 912 Hoge Building, Seattle, Washington,
Proctor for C. R. Hooper, Appellant.

PHILIP D. MacBRIDE, Esq., 912 Hoge Building, Seattle, Washington,
Proctor for L. H. Coolidge and C. V. Hull, Appellants.

Messrs. HASTINGS & STEDMAN, 510 Haller Building, Seattle, Washington,
Proctors for Seattle Shipbuilding & Dry Dock Company ,Appellants.

Messrs. STRATTON & KANE, 710 L. C. Smith Building, Seattle, Washington,
Proctors for Union Oil Company, Appellant.

Messrs. HERR, BAYLEY & CROSON, 900–06 Leary Building, Seattle, Washington,
Proctors for Seattle Hardware Company, Appellant.

Messrs. BYERS & BYERS, 310 Marion Building, Seattle, Washington,
Proctors for Samuel Clark, Appellant.

Messrs. HARTMAN & HARTMAN, 300–306 Burke Building, Seattle, Washington,
Proctors for Kunkler Transportation Company, Appellees.

Messrs. GRINSTEAD, LAUBE & LAUGHLIN, 314 Colman Building, Seattle, Washington,
Proctors for Fidelity & Deposit Company of Maryland, Appellees. [1*]

*Page-number appearing at foot of page of original certified Apostles of Appeal.

In the United States District Court for the Western District of Washington, Northern Division.

No. 7819.

C. R. HOOPER, Doing Business as HOOPER MANUFACTURING COMPANY,
Libelant,

vs.

SS. "DAUNTLESS," Her Tackle, Apparel, etc.,
Respondent;

L. H. COOLIDGE and C. V. HULL, Copartners as L. H. COOLIDGE COMPANY,
Intervening Libelants.

No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY, a Corporation,
Libelant,

vs.

SS. "DAUNTLESS," Her Tackle, Apparel, etc.,
Respondent;

KUNKLER TRANSPORTATION & TRADING COMPANY,
Claimant;

UNION OIL COMPANY OF CALIFORNIA,
Intervening Libelant;

SEATTLE HARDWARE COMPANY,
Intervening Libelant;

SAMUEL CLARK,
Intervening Libelant;

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Surety on Bond to Marshal.

STATEMENT.

July 19, 1923, this suit was commenced by filing a libel in Cause 7798 by the Seattle Shipbuilding & Dry Dock Company against the steamer "Dauntless."

July 20, 1923, claim was interposed by the Kunkler Transportation [2] & Trading Company, after seizure by the Marshal of the steamer "Dauntless" on July 18th. The Fidelity & Deposit Company of Maryland was surety upon the delivery bond, and the vessel was released to said claimant.

Aug. 7th, 1923, written tender was served by the claimant of redilevery to the Marshal, and filed August 8, 1923.

Aug. 15th, 1923, the Court directed redelivery to the Marshal preserving all rights to the libelant as of Aug. 8th. Tender of redelivery was filed with the clerk on Aug. 8th.

Aug. 17th, 1923, intervening libel of Union Oil Company filed, and monition issued.

Aug. 23d, 1923, answer of Kunkler Transportation & Trading Company was filed.

Aug. 25th, 1923, intervening libel Seattle Hardware Company filed.

Aug. 28th, 1923, petition of Fidelity & Deposit Company of Maryland filed.

Sept. 4th, 1923, intervening libel of Samuel Clark filed.

Sept. 17th, 1923, order of consolidation of cause with Cause 7819.

Sept. 21st, 1923, trial before the Hon. Jeremiah Neterer, no reference.

Sept. 25th, 1923, memorandum decision filed.

Aug. 8th, 1923, original libel in Cause 7819 filed, monition issued and vessel seized.

Aug. 22d, 1923, Marshal's return filed, showing seizure Aug. 8th.

Aug. 24th, 1923, intervening libel of L. H. Coolidge Company filed.

Aug. 24th, 1923, monition issued on intervening libel.

Aug. 30th, 1923, interlocutory decree of default entered.

Sept. 10th, 1923, order continuing sale to September 17th.

Sept. 17th, 1923, order consolidation with Cause 7798.

Sept. 18th, 1923, Marshal's return showing sale for $3550.00.

Sept. 21st, 1923, trial before Honorable Jeremiah Neterer. [3]

Sept. 25th, 1923, memorandum decision filed in Cause No. 7798.

July 28, 1924, final decree entered.
July 28th, 1924, notice of appeal served and filed.
[4]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7819.

C. R. HOOPER, Doing Business as the HOOPER MANUFACTURING & MACHINE WORKS,
Libellant,

vs.

Steamer "DAUNTLESS,
Respondent,

LIBEL OF C. R. HOOPER.

To the District Court of the United States for the Western District of Washington.

The libel of C. R. Hooper against the American steamer "Dauntless," her tackle, apparel, and furniture, and against all persons intervening for their interest in said steamer, in a cause of contract, civil and maritime, alleges as follows:

I.

That the libelant is, and at all times herein mentioned was, engaged in the business of operating a machine and pipe shop in the City of Seattle, within said district, and that libelant conducts said business as a sole trader under the name and style of Hooper Manufacturing & Machine Works.

II.

The said steamer "Dauntless" is an American vessel heretofor engaged in carrying freight and passengers upon the waters of Puget Sound.

III.

That while said steamer was in the Port of Seattle, during the months of July and August, 1923, the libelant at the instance and request of the master and owner of said vessel [5] furnished materials, and performed labor upon said vessel of a just and reasonable value of two hundred and 23/100 ($200.23) dollars; and that said material and labor have gone into said steamer in the necessary repairing, altering, equipping and furnishing thereof, and have become a part thereof, and that the said sum of two hundred and 23/100 ($200.23) dollars remain wholly unpaid.

IV.

All and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court, and that said vessel is now in the port of Seattle and within the jurisdiction of this Court.

WHEREFORE the libellant prays, that process in due form of law, according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against said steamer, her tackle, apparel and furniture, and that all persons claiming any right, title or interest in the said steamer, may be cited to appear and answer upon oath all and singular the matters aforesaid, and that the said vessel may be condemned and sold to

pay the amount due to the libellant, with interest and costs, and that the libellant may have such other and further relief as in law and justice he may be entitled to receive.

PHILIP D. MacBRIDE,
Proctor for Libellant. [6]

United States of America,
Western District of Washington,—ss.

C. R. Hooper, being sworn, says that he is the libellant above named; that he has read the foregoing libel, knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

C. R. HOOPER.

Sworn to before me this 8th day of August, 1923.

PHILIP D. CacBRIDE,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 8, 1923. F. M. Harshberger, Clerk. By F. L. Crosby, Jr., Deputy. [7]

In the United States District Court for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY, a Corporation,

Libelant,

vs.

Steamship "DAUNTLESS," Her Engines, Boilers, Tackle, Apparel and Furniture,

Respondent.

LIBEL OF SEATTLE SHIPBUILDING & DRY DOCK COMPANY.

To the Honorable Judges of the United States District Court for the Western District of Washington, Northern Division, Sitting in Admiralty:

The libel and complaint of the Seattle Shipbuilding & Dry Dock Company, a corporation, of Seattle, Washington, against the steamship "Dauntless," her engines, boilers, tackle, apparel and furniture, and against all persons lawfully intervening for their interests therein, in a cause of contract, civil and maritime, alleges as follows, to wit:

1.

That said steamship "Dauntless" is a domestic vessel plying in the waters of Puget Sound in Admiralty Inlet, with her home port at Seattle, Washington, and is owned by the Kunkler Trans-

portation & Trading Company, a corporation, and she is now in the port of the City of Seattle and within the Western District of Washington, Northern Division thereof.

2.

That the libelant, at all times herein mentioned, was, and still is, a corporation organized under the laws of the State of Washington, with its principal place of business at Seattle, Washington, and has paid its annual license fees last due to the State of Washington, and has in all manner complied with the law authorizing it to wage this action. That it is engaged in the general business of shipbuilding and repairing. [8]

3.

That said steamship "Dauntless," on or about the 27th day of February, 1923, requested the libelant to perform work and furnish materials in making repairs to said steamship "Dauntless," in order to render her seaworthy and competent for her service as a freight and passenger steamer in Puget Sound, and that at the request of said Kunkler Transportation & Trading Company, the then owner, your libelant did furnish labor and repair the same for the purposes aforesaid, and did thereafter furnish new machinery, make said repairs to other machinery thereon and other general repairs, as fully appears in the accounts hereto annexed, marked Exhibit "A," and made a part hereof, amounting in all to $5,344.92, of which $2,840.34 was for labor and $2,504.58 was for material.

4.

That said steamer could not with safety have proceeded to sea and engaged in the carriage of passengers and freight without said repairs, and said repairs were made on the credit of said steamship "Dauntless."

5.

That said libelant has repeatedly requested said Kunkler Transportation & Trading Company to pay it said sum of $5,344.92, but no portion thereof has been paid, save and excepting the sum of $500.00 on May 22, 1923, and $500.00 on May 31, 1923, so that there remains wholly due and unpaid the sum of $4,344.92, with interest thereon from June 5, 1923, the date when the last of said work and material were furnished.

6.

That under the laws of Washington and under the general maritime laws, your libelant is entitled to a lien upon said vessel for said labor and materials, constituting said labor and said repairs.

7.

That all and singular the premises are true and within [9] the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelant prays that process of attachment in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against said steamship "Dauntless," her engines, boilers, tackle, apparel and furniture, and that

said Kunkler Transportation & Trading Company and all other persons having or pretending to have any right, title or interest therein may be cited to appear and answer all and singular the matters so articulately propounded, and that this Honorable Court will be pleased to pronounce for the libelant, and will grant such relief to the libelant as shall to law and justice appertain, and shall condemn said ship, her engines, boilers, tackle, apparel, machinery and furniture, and the parties intervening therein in costs, and that said vessel, her engines, boilers, machinery, tackle, apparel and furniture may be condemned and sold to pay the same, and that this Honorable Court shall grant to the libelant such other and further relief as to the Court may seem meet and proper.

H. H. A. HASTINGS,
LIVINGSTON B. STEDMAN,
Proctors for Libelant.

State of Washington,
County of King,—ss.

Andrew W. Carlson, being first duly sworn, on his oath deposes and says:

That he is the vice-president and manager of the Seattle Shipbuilding & Dry Dock Company, libelant above named; that he has read the foregoing libel, knows the contents thereof, and that the same is true, and that there is due to said libelant and unpaid for repairs and labor performed by libelant upon said [10] steamship "Dauntless" the full sum of $4,344.92.

ANDREW W. CARLSON.

Subscribed and sworn to before me this 19th day of July, A. D. 1923.

[Seal] ROSE E. MOHR,

Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 19, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [11]

EXHIBIT "A."

[Billhead of Seattle Shipbuilding and Dry Dock Company.]

May 31, 1923.

SOLD TO Str. "Dauntless," and Owners, Kunkler Transportation & Trading Co., Pier 3, Seattle, Washington.

Customer's Order—Capt., Chief.

Our Order—331.

Work done on above vessel from May 16th to May 25th, 1923, inclusive;

Machine tools used on repair work from Feb. 27th to May 25th, 1923, incl.;

Materials furnished for repairs and on orders of Chief Engineer from Feb. 27th to May 25th, 1923, inclusive;

Completeing machinery and boiler repairs to the above vessel, as per instructions; furnishing machinery and installing new propellor; dry docking, cleaning and painting vessel; etc.; etc.:

LABOR: (Additional to our invoice of May 16th.)

Machinist	104	hr.	@ 1.20	124.80	
" Helper	22½	"	.85	19.12	
Blacksmith	15	"	1.20	18.00	
" Helper	13	"	.85	11.05	
Pipefitter	54½	"	1.20	65.40	
Carpenter	4	"	1.20	4.80	
Caulker	8	"	1.30	10.40	
Dock laborer	55½	"	.85	47.17	
Foreman	10	"	1.40	14.00	
					$314.74

MACHINE TOOLS:

Lathe	65	hr.	@ .75	48.75	
Shaper	4½	"	.75	3.37	
Drill press	25½	"	.75	19.13	
Compressor	23	"	1.50	34.50	
Derrick	1½	"	2.00	3.00	
					108.75

DRY DOCKING:

Docking and undocking				30.00	
Lay days on dock	3		@ 15.00	45.00	
					75.00

MATERIALS:

Per list attached	2102.64	
Handling charge, ten per cent (10%)	210.26	2312.90
Total		$2810.39

[12]

[Billhead of Seattle Shipbuilding and Dry Dock Company.]

May 31, 1923.

Sold to Str. "Dauntless," and Owners, Kinkler Transportation & Trading Co., Pier 3, Seattle, Wash.

Customer's Order.

Our Order—331.

MATERIALS: (Shown at cost) 10% handling charge to be added.

Iron pipe and fittings	543.21
Valves incl. reducing valve, pump, governor, whistle valve	168.48
Copper main steam pipe	92.32
Steam gauges	5.35
Hot well tank	36.47
Steel plate and sheets	259.33
Steel shapes and bars	61.09
Iron castings	41.90
Brass castings	1.18
Patterns	31.50
Babbitt metal	3.34
Fir, oak and iron bark lumber	32.05
Asbestos blocks and cement	105.83

Electric welding	135.90
Acetylene and oxygen	9.85
New cast iron propellor	207.22
Sheet and spiral packing	31.41
Red lead putty etc.	23.14
Kerosene	4.27
Copper paint	33.08
Iron paint	1.84
Lard oil, etc.	3.94
Oakum and cement	1.52
Hack saw blades, files, emery cloth	4.89
Rags	4.62
Hand fire pump	15.00
Canvas	24.02
Bolts, nuts, rivets, studs machine screws	79.56
Spikes, nails, screws, lags	30.18
Deck plates	5.25
Zinc plate	2.17
Oil pan, pump	2.60
Generator brushes	2.10
Blue prints for U. S. Inspectors	4.14
Express charges and cartage	46.49
Tempory lights	6.30
Fresh water	2.30
Outside machine work during strike	38.80
	$2102.64

[13]

[Billhead of Seattle Shipbuilding and Dry Dock Company.]

May 16, 1923.

Sold to Str. "Dauntless," and Owners, Kunkler Transportation & Trading Company, Pier 3, Seattle, Wash.

Customer's Order.

Our Order—331.

Work done on above vessel Feb. 27th to May 15th, 1923, incl.

Overhauling auxiliary machinery;

Building new casing for boiler;

Installing new pipe lines;

All as directed by Chief Engineer;

Making miscellaneous hull and machinery repairs as directed by Captain and Engineer:

LABOR:

Machinist	721	hrs. @	1.20	865.20
" Helper	307½	"	.85	261.37
Blacksmith	61	"	1.20	73.20
" Helper	42½	"	.85	36.13
Boilermaker	161½	"	1.20	193.80
" Helper	71	"	.85	60.35
Burner	39½	"	1.20	47.40
Electrician	7	"	1.20	8.40
Carpenter	39½	"	1.20	47.40
Pipefitter	414½	"	1.20	497.40
" Helper	184	"	.85	156.40
Rigger	10½	"	1.20	12.60

Laborer	11	"	.85	9.35
Foreman	143½	"	1.40	200.90

Total labor to date.....$2469.90

This invoice covers labor only.

May 22, 1923 cash on account	500.00	
" 31, 1923 "	500.00	1000.00

Balance due $1469.90

[14]

[Billhead of Seattle Shipbuilding and Dry Dock Company.]

June 25, 1923.

Sold to Str. "Dauntless," and Owners, Kunkler Transportation & Trading Company, Pier 3, Seattle, Wash.

Customer's Order.

Our Order—432.

To misc. work done on May 31, 1923 and June 5, 1923:

LABOR:

Machinist	33 hrs.	@	1.20	39.60	
" Helper	14 "		.85	11.90	
Foreman	3 "		1.40	4.20	55.70

MATERIAL:

Nuts, bolts, nipples	1.90
Steel and packing	.88

Lampwick	.55	
Pipe 2″	4.79	
	8.12	
Handling charge ten per cent (10%)	.81	8.93
Total		$64.63

[15]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY,

Libelant,

vs.

The Steamship "DAUNTLESS," Her Tackle, Apparel, etc.

KUNKLER TRANSPORTATION & TRADING CO.,

Claimant.

CLAIM.

To the Honorable, the Judges of Said Court:

Comes now Kunkler Transportation & Trading Company, a Washington corporation, with its principal place of business in Seattle, in said District, owner of said steamship "Dauntless," her tackle, apparel and furniture, intervening for its interest

in said vessel, her tackle, etc., appear before this Honorable Court and claim the said vessel, her tackle, etc., and states that it is the true and *bona fide* owner thereof, and that no other person or corporation is the owner thereof.

WHEREFORE, it prays to be admitted to defend accordingly, and that the said Court will be pleased to decree a restitution of the same to it and otherwise right and justice to administer in the premises.

KUNKLER TRANSPORTATION & TRADING COMPANY.

By C. A. McMASTERS,
Its President.

Subscribed and sworn to before me this 20th day of July, 1923.

[Seal] DWIGHT D. HARTMAN,
Notary Public in and for the State of Washington,
Residing at Seattle.

HARTMAN & HARTMAN,
Proctors for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 29, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [16]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY,

Libelant,

vs.

The Steamship "DAUNTLESS," Her Tackle, Apparel, etc.;
KUNKLER TRANSPORTATION & TRADING CO.,

Claimants.

ANSWER.

Comes now Kunkler Transportation & Trading Co., claimant, and for answer to the libel filed herein, states:

I.

It admits the allegations contained in the first, second, and seventh paragraphs thereof.

II.

That the libellant performed certain labor and furnished certain material upon and for said vessel, and respectfully calls for full proof to establish the same.

III.

That libellant submits that judgment may be taken for the amount that may be found to be truly due on account of work done and materials fur-

nished, as aforesaid, conditioned that the vessel shall be ordered sold immediately and at the earliest practical date, so as to lessen the cost of maintenance and marshal's supervision and that the vessel may again be put into the trade on Puget Sound.

For further answer to said libel, the said claimant submits and states: [17]

I.

That when the delivery bond was given and the vessel returned by the marshal to claimant, said bond was conditioned that the surety should be liable unless the vessel was returned to the custody of the marshal, in which event the liability should end and said vessel was returned to the custody of the marshal, in accordance with the terms of the delivery bond, and the order of this Court made directing such return, and since said date the said marshal has been in possession under the order of the Court and in accordance with the terms of the bond, and the said surety, Fidelity & Deposit Co., of Maryland, is now entitled to full release.

WHEREFORE, the said claimant prays that this its answer may be taken under consideration, that a hearing may be speedily and at once had, the claimant waiving the notice required by the rule, and stands ready to have a hearing when ordered by the Court, and that the Court may give and grant such relief as may be just and equitable and make such orders and decrees as shall be according to the right and the understanding agree-

ment between the parties hereto, including the said surety aforesaid.

HARTMAN & HARTMAN,
Proctors for Claimant.

State of Washington,
County of King,—ss.

C. A. McMasters, being first duly sworn upon oath says: That he is the president of the said claimant, that he has read the foregoing answer and knows the contents thereof and believes the allegations therein contained to be true.

C. A. MacMASTERS.

Subscribed and sworn to before me this 22d day of August, 1923.

[Seal] HAROLD H. HARTMAN,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 23/23. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [18]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY,

Libelant,

vs.

The Steamship "DAUNTLESS," Her Tackle, Apparel, etc.;
KUNKLER TRANSPORTATION & TRADING CO.,

Claimants.

REDELIVERY OF VESSEL.

To E. B. Benn, United States Marshal, and All Other Parties Concerned:

WHEREAS the undersigned, the Kunkler Transportation and Trading Company, a corporation of the State of Washington, as principal, and the Fidelity and Deposit Company of Maryland, as surety, did, on July 20, 1923, execute and deliver their bond in the above-entitled cause in a sum not exceeding Six Thousand Dollars ($6,000.00); and,

WHEREAS the condition of such bond is that the principal shall either pay any judgment and abide by any and all orders and decrees made by said court in the above-entitled cause, or, in lieu thereof, shall redeliver the above-named steamship

"Dauntless," her tackle, apparel and furniture into the possession of the said marshal and abide by any such judgment, as the same may be rendered, or any orders, as the same may be made; and

WHEREAS said principal and surety desire to discharge said bond, according to its terms, by delivering said vessel, her tackle, apparel and furniture into the possession of the said marshal,

NOW, THEREFORE, the said principal and surety hereby redeliver and tender said steamship "Dauntless," her tackle, apparel [19] and furniture, into the possession of said marshal; said vessel is now situate at Pier Twelve (12), foot of Wall Street, City of Seattle, in the above-entitled district, where immediate possession can be taken, and you are hereby directed so to do.

Dated this 7th day of August, 1923.

KUNKLER TRANSPORTATION & TRADING CO.

By CHARLES A. MacMASTER,
Its President.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

By J. A. CATHCART,
Its Attorney-in-fact.

Copy received this 7th day of August, 1923.

HASTINGS & STEDMAN,
Proctors for Claimant.

E. B. BENN,
U. S. Marshal.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 8, 1923. F. M. Harshberger, Clerk. [20]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY,

Libelant,

vs.

The Steamship "DAUNTLESS," Her Tackle, Apparel, etc.;

KUNKLER TRANSPORTATION & TRADING CO.,

Claimants.

DELIVERY OF BOND.

WHEREAS, process of the above-entitled court was issued on the 19th day of July, 1923, commanding the marshal of said district to seize and take into his possession the steamship "Dauntless," her tackle, apparel, etc., on account of the claim of the libellant, in the sum of Four Thousand Three Hundred Forty-four and 92/100 Dollars, and in obedience to the writ the said marshal did seize

and take said vessel and is now in possession thereof,

AND WHEREAS, it is agreed between the proctors of the libellant and the proctors of the claimant of said vessel that upon the giving of a bond, with surety, in the sum of Six Thousand Dollars ($6,000.00), said vessel may be released and returned to the claimants. Now, therefore,

KNOW ALL MEN BY THESE PRESENTS, That we, Kunkler Transportation and Trading Company, a corporation of the State of Washington, with its principal office in Seattle, in said District, as principal, and Fidelity & Deposit Co., of Maryland, as surety, are held and firmly bound unto the said libellant, in [21] a sum not exceeding Six Thousand Dollars ($6,000.00), for the payment of which, well and truly to be made, we do hereby bind ourselves, our successors, assigns, executors, administrators and heirs, firmly and severally by these presents.

Dated this 20th day of July, 1923.

The condition of the above obligation is such, however, that if the above-bounden principal shall either pay any judgment and abide by any and all orders and decrees made by said court in the above-entitled cause or in lieu thereof shall redeliver said vessel, with her tackle, apparel and furniture, into the possession of the said marshal, and abide by any such judgment as the same may be rendered, or any orders as the same may be made, then this

obligation be void; otherwise to be and remain in full force and effect.

KUNKLER TRANSPORTATION & TRADING COMPANY,
By C. A. McMASTERS,
Its President.

FIDELITY & DEPOSIT COMPANY OF MARYLAND.
By J. A. CATHCART,
Its Agent.
Atty.-in-fact.

The above bond approved this 20th day of July, 1923.

JEREMIAH NETERER,
Judge.

O. K.—HASTINGS & STEDMAN.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jul. 20, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [22]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY,

Libelant,

vs.

The Steamship "DAUNTLESS," Her Tackle, Apparel, etc.;
KUNKLER TRANSPORTATION & TRADING CO.,

Claimants.

STIPULATION RE ACCEPTANCE OF CUSTODY AND DELIVERY OF STEAMSHIP "DAUNTLESS" BY MARSHAL.

WHEREAS a bond, dated July 20th, 1923, has been executed, delivered and filed in the above-entitled cause; and

WHEREAS the principal and surety did, on August 7th, 1923, tender and offer to redeliver the steamship "Dauntless," her tackle, apparel and furniture, into the possession of the United States Marshal, and in so doing contend that they are performing the conditions of the bond; and

WHEREAS the libelant contends that the bond cannot be discharged in any such manner; and

WHEREAS the principal and surety on said bond desire that the vessel be taken in the custody

of the marshal and held subject to the further order of the Court,—

NOW, THEREFORE, it is hereby stipulated and agreed by and between the libellant and the claimant, through their respective proctors, that the Court may enter its order directing the marshal to accept the custody and delivery of the said vessel "Dauntless," her tackle, apparel and furniture, PROVIDED, HOWEVER, that such acceptance and redelivery shall not affect or in any manner prejudice the rights of any parties hereto as they now exist.

Dated this 8th day of August, 1923.

HASTINGS & STEDMAN,
Proctors for Libellant.
HARTMAN & HARTMAN,
Proctors for Claimants.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 15, 1923. F. M. Harshberger, Clerk. [23]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY,

Libelant,

vs.

The Steamship "DAUNTLESS," Her Tackle, Apparel, etc.;

KUNKLER TRANSPORTATION & TRADING CO.,

Claimants.

ORDER DIRECTING MARSHAL TO ACCEPT REDELIVERY OF VESSEL.

It appearing to the Court that the principal and surety on the bond, dated July 20th, 1923, in a sum not exceeding Six Thousand Dollars ($6,000.00), have tendered and offered to redeliver the steamship "Dauntless," her tackle, apparel and furniture into the possession of the marshal, and the claimants and libellant having stipulated that the United States Marshal should accept the custody and redelivery of said vessel without prejudice to the rights of any parties as they existed on the date of the stipulation Aug. 8, 1923,—

NOW, THEREFORE, it is hereby ordered that the United States marshal accept the custody of the

steamship "Dauntless," her tackle, etc., and retain the same in his custody until the further order of the court respecting the same.

Done in open court this 15th day of August, 1923.

JEREMIAH NETERER,
Judge.

O. K.—HASTINGS & STEDMAN,
Proctors for Libellant.

O. K.—HARTMAN & HARTMAN,
Proctors for Claimants.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 15, 1923. F. M. Harshberger, Clerk. [24]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY,
Libellant,

vs.

The Steamship "DAUNTLESS," Her Tackle, Apparel, etc.;

KUNKLER TRANSPORTATION & TRADING CO.,
Claimants.

PETITION.

Comes now the Fidelity & Deposit Company of Maryland, a corporation, and, for petition in the above-entitled cause, respectfully shows the Court as follows, to wit:

I.

That on the 20th day of July, 1923, your petitioner signed, as surety, a stipulation or bond in the above-entitled matter, for the delivery to the claimant, by the United States marshal, on the steamship "Dauntless," and that the terms of said bond or stipulation, which was in the penal sum of Six Thousand ($6,000.00) Dollars, were as follows:

> "The condition of the above obligation is such, however, that if the above-bounden principal shall either pay any judgment and abide by any and all orders and decrees made by said court in the above-entitled cause or in lieu thereof shall redeliver said vessel, with her tackle, apparel and furniture, into the possession of the said marshal, and abide by any such judgment as the same may be rendered, or any orders as the same may be made, then this obligation be void, otherwise to be and remain in full force and effect."

II.

That on the 7th day of August, 1923, the Kunkler Transportation & Trading Co., claimant, and your petitioner, the Fidelity & Deposit Company of Maryland, tendered redelivery of said vessel [25]

and repossession of the same to the United States marshal.

III.

That on the 8th day of August, 1923, Hastings & Stedman, as proctors for libellant, and Hartman & Hartman, as proctors for claimants, entered into a stipulation that the United States marshal should take possession of said vessel.

IV.

That thereafter, on the 15th day of August, 1923, the court in the above-entitled cause entered an order directing the United States marshal to retake possession of said vessel, and the United States marshal repossessed said vessel on said date and now still is possessed of said vessel.

WHEREFORE, your petitioner, having fully complied with all the terms and conditions of said bond and stipulation, prays that it may be dismissed from said action, that the bond or stipulation herein executed by your petitioner be cancelled and that your petitioner be discharged and exonerated from all further liability in the above-entitled matter.

GRINSTEAD, LAUBE & LAUGHLIN,

HARRY A. RHODES,

Proctors for Fidelity & Deposit Company of Maryland.

United States of America,
State of Washington,
County of King,—ss.

Harry A. Rhodes, being first duly sworn, on oath deposes and says:

That he is one of the proctors for the Fidelity & Deposit Company of Maryland and makes this verification to the foregoing petition of said Fidelity & Deposit Company of Maryland for the reason that there is no officer or agent within the State of [26] Washington to make said verification and that the office of said Fidelity & Deposit Company of Maryland is in Baltimore, Maryland.

Affiant further says that he has read the foregoing petition, knows the contents thereof and the same is true as he verily believes.

HARRY A. RHODES.

Subscribed and sworn to before me this 27th day of August, A. D. 1923.

[Notary Seal] J. A. LAUGHLIN,
Notary Public in and for the State of Washington, Residing at Seattle.

Service by receipt of copy at Seattle, admitted Aug. 27, 1923.

HARTMAN & HARTMAN,
For Claimant.
HASTINGS & STEDMAN,
Attys. for Libellant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 28, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [27]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY,

Libellant,

vs.

The Steamship "DAUNTLESS," Her Tackle, Apparel, etc.;

Respondent;

KUNKLER TRANSPORTATION & TRADING CO.,

Claimant.

EXCEPTIONS OF LIBELLANT TO PETITION OF FIDELITY & DEPOSIT COMPANY OF MARYLAND.

Comes now the libelant herein and excepts to the petition interposed by the Fidelity & Deposit Company of Maryland, a corporation, as follows, to wit:

1.

That said steamer "Dauntless" was, on said July 20, 1923, released upon the bond executed by said claimant and said Fidelity & Deposit Company of Maryland, and that said bond, under the law and practice of this Honorable Court, takes the place of said vessel, and liability thereon cannot be modified or changed by any stipulation therein.

2.

That at the time said bond was tendered to said marshal, said steamer "Dauntless" was encumbered by many maritime liens.

3.

That on August 8, 1923, said steamer "Dauntless" was seized on monition issued by a libel independently filed herein.

4.

That on the 15th of August, 1923, said steamer "Dauntless" was then in possession of said United States under process of this Honorable Court.

5.

That it appears from said petition and the conditions of [28] said bond that said Fidelity & Deposit Company agreed to abide by such judgment as may be rendered after a redelivery of said vessel to said marshal.

6.

That on the face of said petition, said petitioner, Fidelity & Deposit Company, is not entitled to be dismissed from said action or to be relieved from its liability on said bond.

H. H. A. HASTINGS,
LIVINGSTON B. STEDMAN,
Proctors for Libellant.

United States of America,
State of Washington,
County of King,—ss.

Livingston B. Stedman, being first duly sworn, on his oath deposes and says:

That he is secretary of, and one of the proctors

for, the libellant herein; that he makes this verification to the foregoing exceptions for and on behalf of libellant; that he verily believes that said exceptions are true and well-founded in law and under the practice of this Honorable Court.

LIVINGSTON B. STEDMAN.

Subscribed and sworn to before me this 27th day of August, A. D. 1923.

ROSE E. MOHR,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 28, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [29]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY,

Libelant,

vs.

Steamship "DAUNTLESS," etc.,

Respondent.

ORDER FOR CONSOLIDATION.

Now on this 17th day of September, 1923, upon motion of W. B. Stratton, proctor for Union Oil

Co. it is ordered that these two cases numbered 7798 and 7819 be now consolidated for trial and further proceedings.

Journal No. 11, page No. 298. [30]

In the United States District Court for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK CO., a Corporation,

Libelant,

vs.

SS. "DAUNTLESS,"

Respondent,

and

No. 7819.

C. R. HOOPER, Doing Business as HOOPER MANUFACTURING COMPANY,

Libelant,

vs.

SS. "DAUNTLESS,"

Respondent.

DECISION.

Filed 9–24–23.

On the 10th day of July libel was filed, monition issued, and vessel attached. On the 20th a bond was filed for its release. "The condition of the

above obligation is such, however, that if the above bounden principal shall either pay any judgment and abide by any and all orders and decrees made by said court in the above-entitled cause, or in lieu thereof shall deliver said vessel, with her tackle, apparel and furniture, into possession of the said marshal and abide by any judgment as the same may be rendered, or any orders as the same may be made, then this obligation be void, otherwise to be and remain in full force and effect."

The bond was O. K.'d by the proctors for the libelant, it now appears through inadvertence, and was approved by the court. On August 7, the surety and claimant tendered the vessel to the marshal, who declined to receive it. August 8th another original libel was filed by Hooper Mfg. Co., monition issued, and the vessel attached. On August 15 upon stipulation of the surety and the libelant an order directing the marshal to receive the vessel was entered. Intervening libels were filed in each case; the libels were consolidated and the vessel sold. The bonding company has appeared and is asserting exemption from liability because of the tender of the ship pursuant to the clause in the bond. The other parties are asserting that this right cannot obtain. The Hooper Mfg. Co. and L. H. Coolidge & Co., intervenor in the Hooper case, contend that their claims should be paid in full, and the balance prorated among the other intervening libelants, since the vessel was sold in the Hooper Mfg. Co. libel proceeding, and no intervention in that case was made by the other parties. The other

intervening libelants contend that the claim of the Dry Dock Co. rests upon the bond, and that its lien against the vessel was released when the bond was filed, and that all of the other claims should be prorated in the fund upon the proper classification.

HASTINGS & STEDMAN, Proctors for the Libelants, Seattle S. & Dry Dock Co.

STRATTON & KANE, Proctors for Union Oil Co., Intervenors.

BYERS & BYERS, Proctors for Samuel Clark, Intervenor.

HERR, BAYLEY & CROSON, Proctors for Seattle Hardware Co., Intervenors.

HARTMAN & HARTMAN, Proctors for Respondent.

PHILLIP D. McBRIDGE, Proctor for Intervenor L. H. Coolidge, and for Libelant, C. H. Hooper Mfg. Co.

GRINSTEAD, LAUBE & LAUGHLIN, Proctors for Surety.

NETERER, District Judge. [31]

Discharge of a vessel upon stipulation for the payment of the claim frees the vessel from the lien, and she cannot be arrested again for the same cause of action. The Union, 24 Fed. Cas. 535; The Josephine, 21 Fed. Cas. 1075. In these cases the bond was for the payment of the claim, and the release was absolute, and the Court had no power to assert authority over the *rem* which had been

released. In the instant case the condition of the bond is that the

> "Principal shall *either* pay any judgment and abide * * * any * * * decree * * * or in lieu thereof shall return said vessel, and abide any judgment as the same may be rendered. * * * "

There is expressed a clear intent of an alternative obligation; one to pay the judgment and abide the decree, the other to return the ship. Judge Brown in The William McRae, 23 Fed. 557, employed language which indicates that the intention of the parties to subject the vessel to the further jurisdiction of the court has force. At page 558 he says:

> "The Court had no power in the absence of fraud or mistake to order her arrested a second time, and that the fact that the first suit was discontinued with the consent of the claimant indicates no intention actual or in law to subject the vessel to a second arrest, or to waive the rights in that respect, which then belonged to them."

The Old Concord, 18 Fed. Cas. 642, was a general stipulation to pay the claim. The Court held the acceptance of the stipulation had released the vessel from the lien and that the subsequent insolvency of the sureties did not empower the court to reinvest the liens.

It is asserted by the libelant and intervening libelants that the phrase "or in lieu thereof shall redeliver said vessel, etc.," is out of harmony with

the other provisions of the bond, and renders it ambiguous and doubtful, and that the bond must be most strongly construed against the surety. It is also said, that the bond is given pursuant to the provisions of Sec. 1567 C. S., which requires the bond to be "conditioned to answer the decree of the Court in such cause, * * * " and that the Court cannot now assert jurisdiction over the *rem*. On the other hand it is said, that the bond is not statutory, or pursuant to Sec. 1567, C. S., but is an independent stipulation between the parties, and should have operation as such pursuant to the intent therein expressed. Judge Story, in The Alligator, 1 Fed. Cas. 527, No. 248 (1812), held: That the Court, by [32] virtue of its general admiralty jurisdiction has inherent power to deliver property on bail. Justice Clifford, for the Supreme Court, in U. S. vs. Ames (1878), 99 U. S. 35, at p. 40, said:

> "Courts have an undoubted right to deliver the property on bail and enforce conformity to the terms of the bailment." And further on the same page: "Having jurisdiction of the principal cause the court must possess the power over all its incidents. * * * "

This order having been entered pursuant to the agreement of the parties (there being nothing in the law prohibiting it), and the vessel having been returned in obedience to the stipulation, the parties may not now avoid the alternative provision of the stipulation. The Court may not make a contract. The recitals in the bond are conclusive. The purpose for which it was given is plain. The intent

of the parties appears clearly to be in the alternative, and having been agreed to by the proctors for the libelant and approved by the Court the jurisdiction of the Court extends to the *rem* to the extent that the vessel may be returned to the marshal pursuant to the stipulation in the bond, and if the vessel is in the same condition that it was when released the exemption must obtain. That the liens attached when the vessel was released is established. There is no testimony of physical deterioration. All of the lien claimants are in the same situation as if the stipulation had not been given, and have gained the keepers expense for the time the vessel was out of the marshal's custody. The Court no doubt had jurisdiction to direct the marshal upon the record in this case to receive the ship under the terms of the bailment.

The contention of the Hooper Mfg. Co. in the second original libel and the L. H. Coolidge Mfg. Co., intervenors therein, that their claims should be paid in full and the balance of the proceeds distributed among the other claimants cannot be sustained. The second intervening libel should not have been filed, but the claims should have been asserted in the first original libel filed. The cause being consolidated, all claimants will be treated as of that relation. Decrees will be entered in favor of the several claimants as follows: Libelant $4147.42; Union Oil Co., $1062.83; Seattle Hdwe. Co., $518.86; Clark, $785.05; and $225 for wages, which is preferred; Hooper Mfg. Co., $200.15; L. H. Coolidge & Co., $197.50. The claimants, except Clark's pre-

ferred amount will prorate the balance of [33] the fund in the court's exchequer after the payment of the costs. The surety will be released.

NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 25, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [34]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7819.

C. R. HOOPER, Doing Business as HOOPER MANUFACTURING COMPANY,
Libelant,

vs.

SS. "DAUNTLESS," etc.,
Respondent.

No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY, a Corporation,
Libelant,

vs.

SS. "DAUNTLESS," Her Tackle, Apparel, etc.,
Respondent;

KUNKLER TRANSPORTATION & TRADING COMPANY,

Claimant;

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Surety on Bond of Marshal;

UNION OIL COMPANY OF CALIFORNIA,

Intervening Libelant;

SEATTLE HARDWARE COMPANY,

Intervening Libelant;

SAMUEL CLARK,

Intervening Libelant.

L. H. COOLIDGE,

Intervening Libelant.

DECREE.

This cause having heretofore come on for trial, and it appearing to the Court that on the 19th day of July, A. D. 1923, a libel was filed in Cause No. 7798 by the Seattle Shipbuilding [35] & Dry Dock Company, a corporation, against the SS. "Dauntless," monition was issued, and the vessel attached, and on or about the 20th day of July, 1923, appearance was made by the Kunkler Transportation & Trading Company, claimant, and a bond was filed, conditioned as follows, to wit:

> "The condition of the above obligation is such, however, that if the above bounden principal shall either pay any judgment, and abide by any and all orders and decrees made by said

court in the above-entitled cause, or, in lieu thereof, shall redeliver said vessel with her tackle, apparel and furniture into the possession of said marshal, and abide by any such judgment as the same may be rendered or any orders as the same may be made, then this obligation to be void; otherwise to be and remain in full force and effect."

That the Kunkler Transportation & Trading Company filed exceptions to the libel but filed no other or further proceedings or pleading in this cause.

That on the 7th day of August, 1923, the Kunkler Transportation & Trading Company, claimant, tendered back to the United States Marshal said SS. "Dauntless," her tackle, apparel and furniture, and thereafter the court entered an order on, to wit, the 15th day of August, 1923, that the SS. "Dauntless" might be returned to said U. S. Marshal subject to the further order of the court, on stipulation of counsel, without prejudice to the rights of any parties as they existed on August 8, 1923. That said vessel was then in the custody of the United States marshal, and monition issued and attachment made on the libel of C. R. Hooper, in cause No. 7819, filed August 8th, 1923.

That the Union Oil Company filed an intervening libel, claiming $1,062.83, in cause No. 7798.

The Seattle Hardware Company filed an intervening libel in said cause No. 7798, claiming $518.86

Samuel Clark filed an intervening libel in said cause No. 7798, claiming $225 wages and $785.05 money paid for supplies.

That L. H. Coolidge filed an intervening libel in cause 7819, claiming $197.50. [36]

That said cause came on duly for trial upon the proofs and allegations of the parties hereto, said Kunkler Transportation & Trading Company appearing not, either in person or by proctor or advocate; the libelant, Seattle Shipbuilding & Dry Dock Company appearing by Hastings & Stedman, its proctors; the Union Oil Company appearing by Stratton & Kane, its proctors; Seattle Hardware Company appearing by Herr, Bayley & Croson, its proctors; Samuel Clark appearing by Byers & Byers, his proctors; C. R. Hooper appearing by Phillip D. Macbride, his proctor; and L. H. Coolidge appearing by Phillip D. Macbride, his proctor; and the surety upon the delivery bond appearing by Grinstead, Laube & Laughlin;

And the Court having listened to the evidence and argument of counsel directed the following decree should be entered in favor of the respective parties, to wit:

In favor of the libelants for.....	$4,147.42
In favor of the Union Oil Company for	1,062.83
In favor of the Seattle Hardware Company for	518.86
In favor of Samuel Clark for wages	225.00
and for supplies	785.05
In favor of C. R. Hooper for	200.15
In favor of L. H. Coolidge for ...	197.50

And it appearing to the Court that in cause #7819, upon the failure of any claim being filed for said steamer "Dauntless," a decree *venditioni exponas* was duly made and entered, directing the marshal to sell said steamer "Dauntless," her engines, boilers, tackle, apparel and furniture, as provided by law, and that said sale was duly held by said U. S. marshal and said steamer was sold for the sum of $3,550.00, which sale was subsequently confirmed by the Court, and said $3,550.00 paid into the registry of this court in cause No. 7819, and the Court, by written opinion heretofore filed herein, having determined that the surety, Fidelity & Deposit Company of Maryland, by the tender back of said vessel to the U. S. marshal, was entitled to a discharge upon [37] said bond of the Kunkler Transportation & Trading Company, and had performed the conditions thereof by the surrender of said vessel to said marshal.

And it further appearing to the Court that the costs of the U. S. marshal paid by the clerk amounted to $351.12, and the clerk's costs, $71.20,—

It is here and now ORDERED, ADJUDGED AND DECREED that the clerk retain $71.20, its costs;

That there be paid to Hastings & Stedman, proctors for libelant, proctors' fees of $20.00;

To Stratton & Kane, proctors for the Union Oil Company, a proctors' fee of $20.00;

To Herr, Bayley & Croson, proctors for Seattle Hardware Company, a proctors' fee of $20.00;

To Byers & Byers, proctors for Samuel Clark, a proctors' fee of $20.00;

To Philip D. Macbride, proctor for C. R. Hooper, a proctor's fee of $20.00;

To Philip D. Macbride, proctor for L. H. Coolidge, a proctor's fee of $20.00;

To Grinstead, Laube & Laughlin, proctors for the surety, a proctor's fee of $20.00;

That there be paid to Samuel Clark $225.00 for wages;

And that the balance be paid into the registry of the court, to wit, $2,762.68, to be distributed *pro rata* to the libelant and intervening libelants on their respective claims, as follows, to wit:

To Seattle Shipbuilding & Dry Dock Co.	$1,657.72
To Seattle Hardware Company	207.39
To Union Oil Company	424.81
To Samuel Clark	313.78
To C. R. Hooper	79.80
To L. H. Coolidge	78.94

[38]

It is further ORDERED, ADJUDGED AND DECREED that the Fidelity & Deposit Company of Maryland be and it hereby is relieved from all liability on its bond filed for the release of said vessel.

To the entry of that portion of the above decree releasing and exonerating the Fidelity & Deposit Company of Maryland upon its bond filed on July 20, 1923, the libelant excepts and its exception is hereby allowed.

The intervening libelant, Union Oil Company, hereby excepts and its exception is hereby allowed.

The intervening libelant, Seattle Hardware Company, hereby excepts and its exception is hereby allowed.

The intervening libelant, Samuel Clark, excepts and his exception is hereby allowed.

The intervening libelant, C. R. Hooper, excepts and his exception is hereby allowed.

The intervening libelant, L. H. Coolidge, hereby excepts and his exception is hereby allowed.

Done in open court this 28th day of July, A. D. 1924.

JEREMIAH NETERER,
Judge.

O. K.—STRATTON & KANE, For Union Oil Co.

HERR, BAYLEY & CROSON, For Seattle Hdw. Co.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 28, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [39]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7819.

C. R. HOOPER, Doing Business as HOOPER MANUFACTURING COMPANY,
Libelant,

vs.

SS. "DAUNTLESS," Her Tackle, Apparel, etc.,
Respondent;

L. H. COOLIDGE and C. V. HULL, Copartners as L. H. COOLIDGE COMPANY,
Intervening Libelants.

No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY, a Corporation,
Libelant,

vs.

SS. "DAUNTLESS," Her Tackle, Apparel, etc.,
Respondent;

KUNKLER TRANSPORTATION & TRADING COMPANY,
Claimant;

UNION OIL COMPANY OF CALIFORNIA,
Intervening Libelant;

SEATTLE HARDWARE COMPANY,
Intervening Libelant;

SAMUEL CLARK,

Intervening Libelant;

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Surety on Bond of Marshal.

PETITION ON APPEAL.

To the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington:

The petition of C. R. Hooper, doing business as the Hooper [40] Manufacturing Company, L. H. Coolidge and C. V. Hull, copartners as L. H. Coolidge & Company, Seattle Shipbuilding & Dry Dock Company, a corporation, Union Oil Company of California, Seattle Hardware Company, and Samuel Clark respectfully represents that on the 19th day of July, 1923, in cause No. 7798, in Admiralty, of this court, the Seattle Shipbuilding and Dry Dock Company, a corporation, filed its libel in this court against the steamship "Dauntless," her engines, boilers, tackle, apparel and furniture, to recover for the necessary repairs made upon said steamship, and said steamship was attached and a bond to the marshal was executed on July 20, 1923, and said vessel was released on claim of the claimant, Kunkler Transportation & Trading Company, on said July 28, 1923; that on August 7, 1923, the Kunkler Transportation & Trading Company tendered back to the United States marshal said SS. "Dauntless," her tackle, apparel and furniture; that on August 8,

1923, a libel was filed in cause No. 7819 in this court by C. R. Hooper, doing business as the Hooper Manufacturing Company, against said SS. "Dauntless," and monition was issued and said vessel was seized by the marshal; that on the 8th day of August, 1923, a stipulation was entered into by proctors for the libelant, Seattle Shipbuilding & Dry Dock Company, in case No. 7819, that said vessel might be delivered to the marshal without waiver of any rights of said libelant against said bond to the marshal filed on July 20, 1923, for the release thereof; that on the 15th of August, 1923, the Court entered an order that the SS. "Dauntless" should be returned to the United States marshal subject to the further order of the Court and without prejudice to the rights of any parties as they existed on August 8, 1923; that subsequently the Fidelity & Deposit Company of Maryland filed its petition herein asking to be relieved of liability on its bond by reason of the return of said SS. "Dauntless" to the marshal aforesaid; that on July 28, 1924, a final decree was entered in these causes fixing the amounts due the libelants and intervening libelants, and decreeing that the Fidelity & Deposit Company of Maryland [41] be relieved of its obligation on said bond.

Your petitioners believe that said decree is erroneous and that injustice will be done if same is carried into effect.

Your petitioners, therefore, pray for leave to ap-

peal from said decree to the United States Circuit Court of Appeals for the 9th Circuit.

C. R. HOOPER,
By PHILIP D. McBRIDE,
His Proctor.

L. H. COOLIDGE and C. V. HULL,
By PHILIP D. McBRIDE,
Their Proctor.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY,
By HASTINGS & STEDMAN,
Its Proctors.

UNION OIL COMPANY OF CALIFORNIA,
By STRATTON & KANE,
Its Proctors.

SEATTLE HARDWARE COMPANY,
By HERR, BAYLEY & CROSON,
Its Proctors.

SAMUEL CLARK,
By BYERS & BYERS,
His Proctors.

United States of America,
District and State of Wash.,
County of King,—ss.

L. B. Stedman, being first duly sworn, on oath deposes and says: That he is the secretary of the Seattle Shipbuilding & Dry Dock Company, libelant above named, and that he is also one of the proctors of said libelant; that he has read the foregoing

petition, knows the contents thereof, and believes same to be true.

L. B. STEDMAN.

Subscribed and sworn to before me this 28 day of July, A. D. 1924.

H. Y. RAMSEY,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 28, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [42]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7819.

C. R. HOOPER, Doing Business as HOOPER MANUFACTURING COMPANY,
Libelant,

vs.

SS. "DAUNTLESS," Her Tackle, Apparel, etc.,
Respondent;

L. H. COOLIDGE and C. V. HULL, Copartners as L. H. COOLIDGE COMPANY,
Intervening Libelant;

No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY, a Corporation,

Libelant,

SS. "DAUNTLESS," Her Tackle, Apparel, etc.,

Respondent;

KUNKLER TRANSPORTATION & TRADING COMPANY

Claimant;

UNION OIL COMPANY OF CALIFORNIA,

Intervening Libelants;

SEATTLE HARDWARE COMPANY,

Intervening Libelant;

SAMUEL CLARK,

Intervening Libelant;

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Surety on Bond to Marshal.

NOTICE OF APPEAL.

To the Fidelity & Deposit Company of Maryland and to Messrs. Grinstead, Laube & Laughlin, its proctors; Kunkler Transportation & Trading Company and to Messrs. Hartman & Hartman, Its Proctors: [43]

You, and each of you, will please take notice that C. R. Hooper, doing business as the Hooper Manufacturing Company, L. H. Coolidge and C. V. Hull, copartners as L. H. Coolidge & Company, Seattle Shipbuilding & Dry Dock Company, a corporation,

Union Oil Company of California, Seattle Hardware Company, and Samuel Clark, the above-named libelants and intervening libelants, hereby appeal from the final decree of the above-entitled court in the above-entitled causes and from the whole thereof, which decree was made, entered and filed in the above-entitled causes on the 28 day of July, 1924, to the United States Circuit Court of Appeals for the Ninth Circuit.

C. R. HOOPER,
By PHILIP D. MacBRIDE,
His Proctor.

L. H. COOLIDGE and C. V. HULL,
By PHILIP D. MacBRIDE,
Their Proctor.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY.
By HASTINGS & STEDMAN,
Its Proctors.

UNION OIL COMPANY OF CALIFORNIA,
By STRATTON & KANE,
Its Proctors.

SEATTLE HARDWARE COMPANY,
By HERR BAYLEY & CROSON,
Its Proctors.

SAMUEL CLARK,
By BYERS & BYERS,
His Proctors.

Copy of the within received this 28th day of July, 1924.

HARTMAN & HARTMAN.

Copy of the within received Jul. 28, 1924.
GRINSTEAD, LAUBE & LAUGHLIN,
Attorneys for Surety.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 28, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [44]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7819.

C. R. HOOPER, Doing Business as HOOPER MANUFACTURING COMPANY,
Libelant,

vs.

SS. "DAUNTLESS," Her Tackle, Apparel, etc.,
Respondent,
L. H. COOLIDGE and C. V. HULL, Copartners as L. H. COOLIDGE COMPANY,
Intevening Libelants.

No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY, a Corporation,
Libelant,

SS. "DAUNTLESS," Her Tackle, Apparel, etc.,
Respondent;

KUNKLER TRANSPORTATION & TRADING COMPANY,

Claimant;

UNION OIL COMPANY OF CALIFORNIA,

Intervening Libelant;

SEATTLE HARDWARE COMPANY,

Intervening Libelant;

SAMUEL CLARK,

Intervening Libelant;

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Surety on Bond to Marshal.

ASSIGNMENT OF ERRORS ON BEHALF OF LIBELANTS AND INTERVENING LIBELANTS.

I.

The court erred in this: That the Court directed a return of the SS. "Dauntless" to the United States marshal after her release [45] on the claim of the Kunkler Transportation & Trading Company on its bond to the marshal on which the Fidelity & Deposit Company of Maryland was surety, when said vessel was in the custody of the marshal on monition issued upon the libel of C. R. Hooper, doing business as the Hooper Manufacturing Company.

II.

That the Court erred in this: That the redelivery of said vessel to said United States marshal released the bond executed by the Kunkler Trans-

portation & Trading Company and the said Fidelity & Deposit Company of Maryland.

III.

That the Court erred in its decree that said Fidelity & Deposit Company of Maryland be released from all liability on its bond filed for the release of said vessel.

C. R. HOOPER,
By PHILIP D. MacBRIDE,
His Proctor.

L. H. COOLIDGE and C. V. HULL,
By PHILIP D. MacBRIDE,
Their Proctor.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY,
By HASTINGS & STEDMAN,
Its Proctors.

UNION OIL COMPANY OF CALIFORNIA,
By STRATTON & KANE,
Its Proctors.

SEATTLE HARDWARE COMPANY,
By HERR, BAYLEY & CROSON,
Its Proctors.

SAMUEL CLARK,
By BYERS & BYERS,
His Proctor.

Approved: JEREMIAH NETERER,
U. S. District Judge.

Copy of the within received this 28th day of July, 1924.

HARTMAN & HARTMAN.

Copy of the within received Jul. 28, 1924.
GRINSTEAD, LAUBE & LAUGHLIN.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 28, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [46]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7819.

C. R. HOOPER, Doing Business as HOOPER MANUFACTURING COMPANY,
Libelant,

vs.

SS. "DAUNTLESS," Her Tackle, Apparel, etc.,
Respondent;
L. H. COOLIDGE and C. V. HULL, Copartners as L. H. COOLIDGE COMPANY,
Intervening Libelants;

No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY, a Corporation,
Libelant;

SS. "DAUNTLESS," Her Tackle, Apparel, etc.,
Respondent;

KUNKLER TRANSPORTATION & TRADING COMPANY,
Claimant;

UNION OIL COMPANY OF CALIFORNIA,
Intervening Libelant;

SEATTLE HARDWARE COMPANY,
Intervening Libelant;

SAMUEL CLARK,
Intervening Libelant;

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Surety on Bond to Marshal.

AFFIDAVIT OF L. B. STEDMAN THAT APPEAL IS NOT TAKEN FOR DELAY.

United States of America,
District and State of Wash.,
County of King,—ss.

L. B. Stedman, being first duly sworn, on his oath deposes and says: [47]

That he is the secretary of the Seattle Shipbuilding & Dry Dock Company, one of the libelants in the above-entitled causes, and is one of the proctors for said libelant:

That the appeal from the final decree of the District Court is not taken for delay, but because deponent believes that injustice will be done if the decree is carried into effect.

L. B. STEDMAN.

Suscribed and sworn to before me this 28 day of July, A. D. 1924.

[Seal] ROSE E. MOHR,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 28, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [48]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7819.

C. R. HOOPER, Doing Business as HOOPER MANUFACTURING COMPANY,
Libelant,

vs.

SS. "DAUNTLESS," Her Tackle, Apparel, etc.,
Respondent;

L. H. COOLIDGE and C. V. HULL, Copartners as L. H. COOLIDGE COMPANY,
Intervening Libelants.

No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY, a Corporation,
Libelant,

SS. "DAUNTLESS," Her Tackle, Apparel, etc.,
Respondent;

KUNKLER TRANSPORTATION & TRADING COMPANY,
Claimant;

UNION OIL COMPANY OF CALIFORNIA,
Intervening Libelant;

SEATTLE HARDWARE COMPANY,
Intervening Libelant;

SAMUEL CLARK,
Intervening Libelant;

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Surety on Bond to Marshal

ORDER ALLOWING APPEAL AND ORDER FIXING BOND ON APPEAL.

And now, to wit, on this 28th day of July, 1924, L. B. Stedman, one of the proctors for the libelant, Seattle Shipbuilding & Dry Dock Company, in behalf of all of the libelants and [49] of the intervening libelants in these causes, comes into court and prays an appeal from the decree of the District Court in the above-entitled causes, from the District Court of the United States for the Western District of Washington, Northern Division, to the Circuit Court of Appeals for the Ninth Circuit, and thereupon the appeal is allowed on the usual conditions, and the Court hereby fixes the bond on appeal in the sum of $500.00.

Done in open court this 28th day of July, 1924.

JEREMIAH NETERER,
Judge,

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Jul. 28, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [50]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7819.

C. R. HOOPER, Doing Business as HOOPER MANUFACTURING COMPANY,
Libelant,

vs.

SS. "DAUNTLESS," Her Tackle, Apparel, etc.,
Respondent;

L. H. COOLIDGE and C. V. HULL, Copartners as L. H. COOLIDGE COMPANY,
Intervening Libelants.

No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY, a Corporation,
Libelant,

vs.

SS. "DAUNTLESS," Her Tackle, Apparel, etc.,
Respondent;

KUNKLER TRANSPORTATION & TRADING COMPANY,
Claimant;

UNION OIL COMPANY OF CALIFORNIA,
Intervening Libelant;
SEATTLE HARDWARE COMPANY,
Intervening Libelant;
SAMUEL CLARK,
Intervening Libelant;

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Surety on Bond of Marshal.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, C. R. Hooper, doing business as Hooper Manufacturing Company, libelant, L. H. Coolidge and C. V. Hull, copartners as L. H. Coolidge Company, [51] intervening libelant, Seattle Shipbuilding & Dry Dock Company, a corporation, libelant, Union Oil Company of California, a corporation, intervening libelant, Seattle Hardware Company, intervening libelant, Samuel Clark, intervening libelant, as principals, and the American Surety Company of New York, a corporation duly established by the laws of the State of New York, as surety, are held and firmly bound unto the Fidelity & Deposit Company of Maryland and the Kunkler Transportation & Trading Company, or either of said parties, in the full and just sum of $500.00 to be paid to said obligees, or either of them, or to their or its attorneys, successors, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, suc-

cessors, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 28th day of July, in the year of our Lord one thousand nine hundred and twenty-four.

WHEREAS, lately in the District Court of the United States for the Western District of Washington, Northern Division, in a suit in admiralty depending in said court between C. R. Hooper, doing business as Hooper Manufacturing Company, libelant, Seattle Shipbuilding & Dry Dock Company, a corporation, libelant, and intervening libelants against the steamship "Dauntless" and the Kunkler Transportation & Trading Company, a claimant, and the Fidelity & Deposit Company of Maryland, surety upon the bond for delivery, a decree was entered in favor of said Fidelity & Deposit Company of Maryland, and said principals to this obligation having obtained an appeal to remove said cause to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree in the aforesaid suit, and a citation having issued directed to said Fidelity & Depost Company of Maryland and the Kunkler Transportation & Trading Company citing and admonishing them to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit in the city of San Francisco, [52] California, on the 26th day of August, A. D. 1924.

Now, the condition of the above obligation is such that if said principals shall prosecute their appeal to effect, and pay any decree of the court upon appeal or otherwise, and answer all damages and costs

if they fail to make their appeal good, then the above obligation to be void; else to remain in full force and virtue.

C. R. HOOPER, Doing Business as HOOPER MANUFACTURING COMPANY,
By PHILIP D. MacBRIDE,
His Proctor.

L. H. COOLIDGE and C. V. HULL, Copartners as L. H. COOLIDGE COMPANY,
By PHILIP D. MacBRIDE,
Their Proctor.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY,
By HASTINGS & STEDMAN,
Its Proctors.

UNION OIL COMPANY OF CALIFORNIA,
By STRATTON & KANE,
Its Proctors.,

SEATTLE HARDWARE COMPANY,
By HERR, BAYLEY & CROSON,
Its Proctors.

SAMUEL CLARK,
By BYERS & BYERS,
His Proctors.

AMERICAN SURETY COMPANY OF NEW YORK,
By A. E. KRULL,
Its Resident Vice-president.
By E. E. PERRY,
Its Resident Assistant Secretary.

Approved:

NETERER,
United States District Judge.

O. K.—HARTMAN & HARTMAN,
Attorneys for Kunkler Transportation & Trading Co.

O. K. as to form—GRINSTEAD, LAUBE & LAUGHLIN.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 28, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [53]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7819.

C. R. HOOPER, Doing Business as HOOPER MANUFACTURING COMPANY,
Libelant,

vs.

SS. "DAUNTLESS," Her Tackle, Apparel, etc.,
Respondent;

L. H. COOLIDGE and C. V. HULL, Copartners as L. H. COOLIDGE COMPANY,
Intervening Libelants;

No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY, a Corporation,

Libelant,

vs.

SS. "DAUNTLESS," Her Tackle, Apparel, etc.,

Respondent;

KUNKLER TRANSPORTATION & TRADING COMPANY,

Claimant;

UNION OIL COMPANY OF CALIFORNIA,

Intervening Libelant;

SEATTLE HARDWARE COMPANY,

Intervening Libelant;

SAMUEL CLARK,

Intervening Libelant;

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Surety on Bond of Marshal.

STIPULATION RE PRINTING APOSTLES ON APPEAL.

IT IS STIPULATED by and between the libelant, C. R. Hooper, through his proctor, Philip MacBride, the libelant, Seattle Shipbuilding & Dry Dock Company, a corporation, through its proctors, [54] Hastings & Stedman, the intervening libelant, Union Oil Company of California, through its proctors, Stratton & Kane, the intervening libelant, Seattle

Hardware Company, through its proctors, Herr, Bayley & Croson, the intervening libelant, Samuel Clark, through his proctors, Byers & Byers, the intervening libelants, L. H. Coolidge and C. V. Hull, through their proctor Philip MacBride, on the one hand, and the Kunkler Transportation & Trading Company, claimant, through its proctors, Hartman & Hartman, and the Fidelity & Deposit Company of Maryland, surety on the bond of claimant to the marshal, through its proctors, Grinstead, Laube & Laughlin, on the other hand, as follows, to wit:

Stipulations for costs were duly filed by all parties appearing, and that in making up the record to be transmitted to the Circuit Court of Appeals, the Clerk of the District Court shall omit therefrom all pleadings save and except:

1. Libel of C. R. Hooper in cause #7819.
2. Libel of the Seattle Shipbuilding & Dry Dock Company in cause #7798.
3. Claim of the Kunkler Transportation & Trading Company.
4. Answer of the Kunkler Transportation & Trading Co.
5. Bond of the Kunkler Transportation & Trading Company and of the Fidelity & Deposit Company of Maryland.
6. Tender of redelivery to the marshal.
7. Stipulation of Hastings & Stedman and Hartman & Hartman, dated August 8, 1923.
8. Order directing marshal to accept redelivery, dated August 15, 1923.

9. Petition of Fidelity & Deposit Company of Maryland for relief of liability on delivery of bond.
10. Exceptions to said petition.
11. Order consolidating causes.
12. Memorandum opinion of court.
13. Final decree.
14. Notice of appeal.
15. Assignment of errors. [55]
16. Bond on appeal.
17. Stipulation for record.
18. Clerk's certificate.

The sole and only question involved on appeal is the decision of the Court that the surrender of the vessel by the claimant satisfied and discharged the delivery bond executed by the claimant and the Fidelity & Deposit Company of Maryland.

Dated at Seattle, Washington, this 28th day of July, A. D. 1924.

C. R. HOOPER,
By PHILIP D. MacBRIDE,
His Proctor.

L. H. COOLIDGE and C. V. HULL,
By PHILIP D. MacBRIDE,
Their Proctor.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY,
By HASTINGS & STEDMAN,
Its Proctors.

KUNKLER TRANSPORTATION & TRADING COMPANY,
By HARTMAN & HARTMAN,
Its Proctors.

UNION OIL COMPANY OF CALIFORNIA,
By STRATTON & KANE,
Its Proctors.
SEATTLE HARDWARE COMPANY,
By HERR, BAYLEY & CROSON,
Its Proctors.
SAMUEL CLARK,
By BYERS & BYERS,
His Proctors.
FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By GRINSTEAD, LAUBE & LAUGHLIN,
Its Proctors.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 28, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [56]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7819.

C. R. HOOPER, Doing Business as HOOPER MANUFACTURING COMPANY,
Libelant,
vs.
SS. "DAUNTLESS," Her Tackle, Apparel, etc.,
Respondent;
L. H. COOLIDGE and C. V. HULL, Copartners as L. H. COOLIDGE COMPANY,
Intervening Libelants;

No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY, a Corporation,

Libelant,

vs.

SS. "DAUNTLESS," Her Tackle, Apparel, etc.,

Respondent;

KUNKLER TRANSPORTATION & TRADING COMPANY,

Claimant;

UNION OIL COMPANY OF CALIFORNIA,

Intervening Libelant;

SEATTLE HARDWARE COMPANY,

Intervening Libelant;

SAMUEL CLARK,

Intervening Libelant;

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Surety on Bond to Marshal.

PRAECIPE FOR APOSTLES ON APPEAL.

To F. M. Harshberger, Clerk of the United States District Court:

Please prepare the record on appeal and transmit to the Circuit Court of Appeals the following instruments: [57]

1. A caption exhibiting the proper style of the court and the title of the cause. A statement showing the time of the commencement of the suit.

Names of the original parties. Names of intervening libelants. Name of Judge hearing cause.

2. Copies of all pleadings and orders as contained in the stipulation for record signed by the parties hereto and filed on July 28th, including the stipulation itself; together with copies of the petition on appeal; order allowing appeal and fixing amount of bond on appeal; and affidavit that appeal is not taken for delay.

HASTINGS & STEDMAN,
Of Proctors for Appellants.

Copy of the within received this 29th day of July, 1924.

HARTMAN & HARTMAN.

Copy of within received Jul. 29, 1924.

GRINSTEAD, LAUBE & LAUGHLIN.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 29, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [58]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7819.

C. R. HOOPER, Doing Business as the HOOPER MANUFACTURING & MACHINE WORKS,

Libelant,

vs.

Steamer "DAUNTLESS,"

Respondent.

No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY, a Corporation,

Libelant,

vs.

Steamship "DAUNTLESS," Her Engines, Boilers, Tackle, Apparel and Furniture,

Respondent,

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO APOSTLES ON APPEAL.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered

from 1 to 58, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing-entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain on record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal herein, from the judgment of the said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit. [59]

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred, and paid in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit on the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.), for making record, certificate or return 156 folios at 15¢	$23.40
Certificate of Clerk to transcript of record, 4 folios at 15¢	60
Seal to said certificate	20

I hereby certify that the above cost for preparing and certifying record, amounting to $24.20, has been paid to me by proctor for the appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District

Court at Seattle, in said District, this 7th day of August, 1924.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western District of Washington.

By S. E. Leitch,
Deputy. [60]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7819.

C. R. HOOPER, Doing Business as HOOPER MANUFACTURING COMPANY,
Libelant,

vs.

SS. "DAUNTLESS," Her Tackle, Apparel, etc.,
Respondent;

L. H. COOLIDGE and C. V. HULL, Copartners as L. H. COOLIDGE COMPANY,
Intervening Libelants.

No. 7798.

SEATTLE SHIPBUILDING & DRY DOCK COMPANY, a Corporation,
Libelant,

vs.

SS. "DAUNTLESS," Her Tackle, Apparel, etc.,
Respondent;

KUNKLER TRANSPORTATION & TRADING COMPANY,
Claimant;

UNION OIL COMPANY OF CALIFORNIA,
Intervening Libelant;

SEATTLE HARDWARE COMPANY,
Intervening Libelant;

SAMUEL CLARK,
Intervening Libelant;

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Surety on Bond to Marshal.

CITATION.

The President of the United States to the Fidelity & Deposit Company of Maryland and to the Kunkler Transportation & Trading Company, GREETING:

You are hereby cited and admonished to be and appear at [61] the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California, on the 26 day of August, one thousand nine hundred and twenty-four, pursuant to an appeal from a district of the District Court of the United States for the Western District of Washington, Northern Division, in a certain cause in admiralty, wherein you are intervenor and claimant, respectively, to show cause, if any there be, why the decree rendered against the libelants and intervening libelants and in your favor, as in said decree mentioned, should not be

corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the city of Seattle on this 28th day of July, in the year of our Lord one thousand nine hundred and twenty-four and the 149th year of the Independence of the United States.

JEREMIAH NETERER,
United States District Judge.

Service of the foregoing citation is hereby admitted this 29th day of July, 1924.

GRINSTEAD, LAUBE & LAUGHLIN,
Proctors for Fidelity & Deposit Company of Maryland.

HARTMAN & HARTMAN,
Proctors for the Kunkler Transportation & Trading Company. [62]

[Endorsed]: No. ——. In the District Court of the United States for the Western District of Washington, Northern Division. No. 7819. C. R. Hooper, Doing Business as Hooper Manufacturing Company, Libelant, vs. SS. "Dauntless," Her Tackle, Apparel, etc., Respondent, L. H. Coolidge et al., Intervening Libelant. No. 7798. Seattle Shipbuilding & Dry Dock Company, Libelant, v. SS. "Dauntless," Her Tackle, etc., Respondent, Kunkler Transportation & Trading Company, Claimant, etc. Citation. Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 29, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: No 4302. United States Circuit Court of Appeals for the Ninth Circuit. C. R. Hooper, Doing Business as Hooper Manufacturing Company, L. H. Coolidge and C. V. Hull, Copartners, as L. H. Coolidge Company, Seattle Shipbuilding and Dry Dock Company, a Corporation, Union Oil Company of California, a Corporation, Seattle Hardware Company, a Corporation, and Samuel Clark, Appellants, vs. Kunkler Transportation Company, a Corporation, and Fidelity & Deposit Company of Maryland, Appellees. Apostles. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed August 11, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4302.

In The United States Circuit Court of Appeals

For The Ninth Circuit

C. R. HOOPER, Doing Business as HOOPER MANUFACTURING COMPANY, L. H. COOLIDGE and C. V. HULL, Copartners as L. H. COOLIDGE COMPANY, SEATTLE SHIPBUILDING & DRY DOCK COMPANY, a Corporation, UNION OIL COMPANY OF CALIFORNIA, a Corporation, SEATTLE HARDWARE COMPANY, a Corporation, and SAMUEL CLARK,

Appellants,

v.

KUNKLER TRANSPORTATION & TRADING COMPANY, a Corporation, and FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Appellees.

BRIEF OF APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JEREMIAH NETERER, *Judge.*

PHILIP D. MACBRIDE,
Proctor for C. R. Hooper, doing business as Hooper Manufacturing Company, and for L. H. Coolidge and C. V. Hull, co-partners as L. H. Coolidge Company.

HASTINGS & STEDMAN,
Proctors for Seattle Shipbuilding & Dry Dock Company.

STRATTON & KANE,
Proctors for Union Oil Company of California.

HERR, BAYLEY & CROSON,
Proctors for Seattle Hardware Company

BYERS & BYERS,
Proctors for Samuel Clark.

P. O. Address: Seattle, Washington.

THE ARGUS PRESS, SEATTLE

No. 4302.

In The United States Circuit Court of Appeals

For The Ninth Circuit

C. R. HOOPER, Doing Business as HOOPER MANUFACTURING COMPANY, L. H. COOLIDGE and C. V. HULL, Copartners as L. H. COOLIDGE COMPANY, SEATTLE SHIPBUILDING & DRY DOCK COMPANY, a Corporation, UNION OIL COMPANY OF CALIFORNIA, a Corporation, SEATTLE HARDWARE COMPANY, a Corporation, and SAMUEL CLARK,

Appellants,

v.

KUNKLER TRANSPORTATION & TRADING COMPANY, a Corporation, and FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Appellees.

BRIEF OF APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JEREMIAH NETERER, *Judge.*

PHILIP D. MACBRIDE,
Proctor for C. R. Hooper, doing business as Hooper Manufacturing Company, and for L. H. Coolidge and C. V. Hull, co-partners as L. H. Coolidge Company.

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BRIEF OF APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JEREMIAH NETERER, *Judge.*

STATEMENT OF THE CASE.

This cause was commenced by the Seattle Shipbuilding & Dry Dock Company filing a libel against

the Steamer "Dauntless" on July 19, 1923, for labor and material for repairs, in the sum of $4,344.92.

On the same date, the vessel was seized by the United States Marshal.

On the next day, July 20, 1923, a claim was interposed by the Kunkler Transportation & Trading Company, and a bond was executed as follows (omitting caption and signatures):

> "WHEREAS, process of the above entitled court was issued on the 19th day of July, 1923, commanding the marshal of said district to seize and take into his possession the steamship "Dauntless", her tackle, apparel, etc., on account of the claim of the libellant, in the sum of Four Thousand Three Hundred Forty-four and 92/100 Dollars, and in obedience to the writ the said marshal did seize and take said vessel and is now in possession thereof,
>
> "AND WHEREAS, it is agreed between the proctors of the libellant and the proctors of the claimant of said vessel that upon the giving of a bond, with surety, in the sum of Six Thousand Dollars ($6,000.00), said vessel may be released and returned to the claimants. Now, therefore,
>
> "KNOW ALL MEN BY THESE PRESENTS, That we, Kunkler Transportation & Trading Company, a corporation of the State of Washington, with its principal office in Seattle, in said District, as principal, and Fidelity & Deposit Co., of Maryland, as surety, are held and firmly

bound unto the said libellant, in a sum not exceeding Six Thousand Dollars ($6,000.00), for the payment of which, well and truly to be made, we do hereby bind ourselves, our successors, assigns, executors, administrators and heirs, firmly and severally by these presents.

"Dated this 20th day of July, 1923.

"The condition of the above obligation is such, however, that if the above-bounden principal shall either pay any judgment and abide by any and all orders and decrees made by said court in the above entitled cause or in lieu thereof shall redeliver said vessel, with her tackle, apparel and furniture, into the possession of the said marshal, and abide by any such judgment as the same may be rendered, or any orders as the same may be made, then this obligation be void; otherwise to be and remain in full force and effect."

and the vessel was thereupon delivered to the claimant.

On August 7, 1923, a written tender of redelivery to the marshal was served upon the marshal and proctors for the libellant, and filed in court on August 8, 1923.

On August 15, 1923, the court directed redelivery to the marshal upon stipulation of proctors for claimant and libellant, in which stipulation it was recited that the claimant and surety tendered and offered to redeliver the "Dauntless" to the marshal on August 7, 1923, and in so doing, they contended

that they were performing the conditions of the bond. The stipulation further recited that libellant contended that the bond could not be discharged in any such manner, and further recited that the principal and surety desired that the vessel be taken into the custody of the marshal and held subject to the further order of the court, and that the court might enter its order directing the marshal to accept the custody and delivery of said vessel, "provided, however, that such acceptance and delivery shall not effect, or in any manner prejudice, the rights of any parties hereto as they now exist."

On August 8, 1923, prior to the redelivery of said vessel to the marshal, an independent suit was commenced by C. R. Hooper, and the vessel was seized on monition duly issued and subsequently sold after default on order of sale duly entered by the court.

Subsequently, L. H. Coolidge and C. V. Hull intervened in said second cause, and the other intervenors intervened in said first cause.

On motion of intervenor, Union Oil Company of California, the two causes were consolidated.

The Fidelity & Deposit Company of Maryland, surety of the claimant on the bond for delivery of the vessel, on August 28, 1923, filed its petition praying that it might be dismissed from the action, and that the bond or stipulation executed by such surety company should be cancelled and the surety company discharged and exonerated from all further liability in the matter.

Upon trial had, proof was offered in behalf of the

claims of the respective libellants and intervening libellants, and thereafter, by memorandum decision, the court directed a decree in favor of libellant and intervening libellants for the amounts claimed excepting that the claim of intervening libellants, Coolidge & Hull, was deducted from the claim of the libellant, Seattle Shipbuilding & Dry Dock Company, and the court directed that the surety be released.

A decree was subsequently entered in conformity with the court's opinion, and the libellants and intervening libellants appeal on the sole contention that the court erred in its decision that the surrender of the vessel by the claimant satisfied and discharged the delivery bond executed by the claimant and the Fidelity & Deposit Company of Maryland.

SPECIFICATION OF ERROR

The court erred in holding and deciding that the redelivery of the vessel by the claimant and surety released the bond and discharged the surety.

ARGUMENT

1. The release of the "Dauntless" from arrest by the marshal was procurable by the claimant only by virtue of Sec. 941 of the Revised Statutes, providing for a bond to the marshal, or by stipulation under the rules of the court.

U. S. Supreme Court Admiralty Rule 12;
District Court Admiralty Rule 21.

2. The stipulation or bond given for release of

the vessel is construed according to the rule of the court or the statute.

Benedict on Admiralty, 4th Ed. Sec. 420, p. 286;

Lane v. Townsend, Fed. Case, No. 8054, 14 Fed. Cas. 1090 at 1091.

3. The claimant, receiving the vessel from the marshal on the execution of delivery bond, received her *cum onere* released from the claim of the libellant on which she was seized, but subject to all other liens.

Benedict on Admiralty, (4th Ed.) Sec. 421;

The Langdon Cheves, 2 Mason, 58, Fed. Cas. No. 8064. 14 Fed. Cas. 1111;

The Palmyra, 12 Wheat. 1, at p. 10.

4. After the release of the "Dauntless" on the bond, the libellant, Seattle Shipbuilding & Dry Dock Company, could not have caused her second arrest for the same cause.

The Wild Ranger, Brown & Lush 84 (quoted in *The Josephine* Fed. Cas. 12663);

Home Ins. Co. v. The Concord, Fed. Cas. No. 6659. 12 Fed. Cas. 448;

Senab v. The Josephine, Fed. Cas. No. 12663. 21 Fed. Cas. 1075;

The Union, 4 Blatch. 90; Fed. Case No. 14346; 24 Fed. Cas. 535;

The Wm. F. McRae, 23 Fed. 557;

The Mutual, 78 Fed. 144;

The Cleveland, 98 Fed. 631.

In *The Wild Ranger*, Dr. Lushington states:

> "Now, the bail given for the ship in any action is the substitute for the ship; when the bail is given, the ship is immediately released from that cause of action and cannot be arrested again for that cause of action. Also, if the ship is sold in another action, the proceeds, save by the operation of some act of parliament, are liable only to the payment of liens. In this case then, after the bail was taken, the ship herself never could have been made liable for damage or interest."

In *The Union*, *supra*, Circuit Justice Nelson states, in commenting upon the order of the court for claimant's redelivery of the vessel to the marshal:

> "This order assumes that the discharge of the vessel from the seizure, and her delivery to her owners, was not absolute, but that she is still subject to the exertion of the power of the court for the purpose of satisfying any decree. No case has been furnished in which this power of the admiralty has been exerted; and, on principle, I do not well see how it can be maintained. The vessel, after being discharged from the arrest upon the giving of the bond or stipulation, returns into the hands of the owner, subject to all previously existing liens or charges, the same as before the seizure, except as respects that on account of which the seizure was made. She is also subject to any subsequently accruing

liens or charges in the hands of her owner, or in the hands of any person to whom she may have been transferred. The redelivery, therefore, of the vessel, if permitted, or enforced, must necessarily be a redelivery subject to all these existing or subsequently accruing liens, and, also, to the rights of any *bona fide* purchasers, if a sale has in the meantime taken place. The complication and embarrassment growing out of the exercise of the power, if sanctioned, are apparent, and this, doubtless, accounts for the absence of any precedent in the books. In the present case the vessel has been sold, and has passed into the hands of the purchaser, and his title is, I think, undoubted. It is so for the reason that, on the discharge of the vessel, on the giving of the bond or stipulation, she is thereby discharged from the lien or incumbrance which constituted the foundation of the proceeding against her, the security taken being the substitute for the vessel."

In *Home Ins. Company v. The Concord, supra,* referring to an order remanding the vessel to the marshal, the court stated:

"The next and remaining question is as to the validity of the order remanding the vessel. I shall not stop to argue the question. It seems to be too well settled, both in this country and in England, to need further elucidation, that the vessel on being discharged from arrest upon the giving of the bond or stipulation, returns

into the hands of her owner, discharged from the lien incumbrance which constituted the foundation of the proceedings against her forever; and, for all purposes whatsoever, the surety taken being as a substitute for the vessel, and the court has no power or jurisdiction over her thereafter in the same suit for the same cause. *The Union* (Case No. 14346); *The White Squall* (Id. 17570); *The Kalamazoo*, 9 Eng. Law & Eq. 557, 560; 15 Law Rep. 563."

In *The William F. McRae, supra*, Judge Brown, in determining that a second libel could not be filed in the second cause of action, after the discharge upon delivery bond in the first action, says:

"That a vessel discharged from arrest upon admiralty process by the giving of a bond or stipulation for her value, or for the payment of the amount claimed in the libel, returns to her owner freed forever from the lien upon which she was arrested, and can never be seized again for the same cause of action, even by the consent of parties, is a proposition too firmly established to be open to question. *The Kalamazoo*, 9 Eng. Law & Eq. 557; *The Wild Ranger*, Brown & Lush, 84; *The Union*, 4 Blatchf. 90; *The White Squall*, 4 Blatchf. 103; *The Old Concord*, 1 Brown, Adm. 270; *The Josephine*, 4 Cent. Law J. 262."

In *The Cleveland, supra*, Judge Hanford held that even after a dismissal of the libel without

prejudice, following release of vessel on bond, the vessel could not be again seized. Judge Hanford reviews the earlier decisions and concludes his opinion as follows:

> "Upon the authority of the decisions above referred to, and other cases to which they refer, I am obliged to hold that the release of the steamship Cleveland in the former suit against her, by these libellants, discharged her absolutely from liability to answer the demands of the libellants in this case, and that the proviso in the order dismissing the former suit that the same was made without prejudice can have no other effect, as a saving clause, than to prevent the decree of dismissal from being set up in bar of subsequent suits *in personan* against the master or owners of the vessel. Motion to dismiss granted."

5. After she has once been discharged upon bond, the court has no power to order the redelivery of the vessel to the marshal to answer the claim of the libellant.

The Union, Fed. Cas. No. 14346; 24 Fed. Cas. 535;
The Cleveland, 98 Fed. 631;
The Mutual, 78 Fed. 144.

6. The bond was for the benefit of the libellant, Seattle Shipbuilding & Dry Dock Company, only,—the other libellants being free to libel the vessel for their claims.

The Oregon, 158 U. S. 186;
The Wanata, 95 U. S. 600.

7. Judge Neterer, in his decision, rests his authority therefor on *The William F. McRae*, 23 Fed. 557, and *United States v. Ames*, 99 U. S. 35. The quotation in his opinion from 23 Fed. 558, attributed to Judge Brown, is a statement by Judge Brown of the holding of Judge Blatchford in *The Thales*, 3 Ben. 327, Fed. Case No. 13855, as appears from the following quotation on page 883 of 23 Fed. Cas.:

> "If the court has no power to order a vessel which has been fairly discharged, on a bond or stipulation, from an arrest, back into the custody of the marshal, in the same suit, as was held in the case of *The Union* (*supra*), and also in the case of *The White Squall* (Case No. 17570), *a fortiori*, it has no power to order her to be arrested a second time, in another suit, for the same cause of action. To order her back into the custody of the marshal, in the same suit, when she has been fairly, and not improvidently, or by fraud, or mistake, discharged by bonding, is simply to arrest her a second time for the same cause of action, after she has been discharged by bonding, from the lien or charge in respect of which she was arrested. To arrest her, under the same circumstances, in a new suit, for the same cause of action, is to do nothing more or less. In *The Kalamazoo*, 9 Eng. Law & Eq. 557, 560, Dr. Lushington says: 'It is perfectly competent to take bail to the full

value; but the effect of taking bail is to release the ship in that action altogether. It would be perfectly absurd to contend that you could arrest a ship, take bail to any amount, and afterwards arrest her again for the same cause of action. The bail represents the ship, and, when a ship is once released upon bail, she is altogether released from that action."

"The libellant urges, that the fact that the former suit was discontinued, and that the costs therein were paid, before the present suit was brought, remits the libellant to all the rights which he had at the time he instituted the former suit, and that such discontinuance operates to make the arrest of the vessel, in the present suit, an original arrest, and not a second arrest. This view overlooks the fact that the vessel was discharged on bond on the 10th of July, 1857, and that the former suit was not discontinued until the 4th of March, 1858. The rights of the parties interested in the vessel were fixed by the bonding and discharge, and she then returned into their hands freed from the lien or charge for which she had been arrested, and from liability to be again arrested therefor."

so that the quotation by Judge Neterer is not authority for the conclusion reached especially when considered in connection with the quotation heretofore appearing in this brief from Judge Brown's decision. Nor is the *United States v. Ames*, 99 U. S. 35, an authority in support of the court's decision

as appears by a study of *United States v. The Haytion Republic*, 154 U. S. 118, 38 L. Ed. at p. 933, where Mr. Justice White says:

> "It is true that, where a fraudulent appraisement has been had, or a fraudulent or illegal bond has been given, in an admiralty proceeding, the court has the power to recall the vessel for the purpose of requiring an honest appraisement and of exacting a legal bond. *United States v. Ames*, 99 U. S. 35; *The Union*, 4 Blatchf. 90; *The Favorite*, 2 Flip. 87; *The Thales*, 3 Ben. 327; 2 Parsons, Shipping, 411. This special power, however, to meet a particular contingency does not affect the general rule, or imply that the vessel, after a legal bond has been given, remains in the exclusive custody and jurisdiction of the court. *The Union, supra.*"

Judge Neterer could not have been mindful of his own decision in *The Comanche*, 1923 A. M. C., 201, wherein he says:

> "The filing of the bond or stipulation discharged the vessel from arrest upon the admiralty process; and the return of the vessel, in the language of Judge Brown, in *The William F. McRae*, 23 Fed. 557 at 558, 'to her owner freed (her) forever from the lien upon which she was arrested, and can never be seized again for the same cause of action'. This was followed by Judge Townsend in *The Mutual*, 78 Fed. 144. Judge Choate in *The Naher*, 9 Fed. 213, said: a vessel 'having given bail * * * was not

liable to be again arrested for the same cause of action' ".

It is proper to note that in *The Haytian Republic*, the supreme court determined that, after release of the Haytian Republic on bond in the District of Washington, she was still liable for seizure on other causes of action in the District of Oregon.

8. Even though the court had power to order the return of the vessel, the libellants contend that the court absolutely ignored the final clause in the condition of the bond, which is as follows: "or, in lieu thereof, shall redeliver said vessel, with her tackle, apparel and furniture, into the possession of the said marshal, *and abide by any such judgment as the same may be rendered, or any orders as the same may be made*, then this obligation be void; otherwise to be and remain in full force and effect." (Italics ours). The stipulation, after redelivery of the vessel, to abide by any such judgment, could only refer to the judgment which the claimant and surety stipulated to pay and abide by in the event the vessel had not been redelivered. In other words, the full performance of the covenant or condition is not met by redelivery of the vessel to the marshal, but must be accomplished, according to the terms of the bond, by abiding by such judgment as the same may be rendered.

9. The obligation of a compensated surety, in executing a bond required by statute or writ of court, is strictly construed.

Duke v. National Surety Co., 30 Wash. Dec., p. 217, where Judge Mackintosh says:

> "The first question for determination is whether the bond is a statutory one, as claimed by the respondent, or a common law bond, as claimed by the appellant. In the determination of this question certain general rules are to be borne in mind. One of these is that, in dealing with the bonds of a compensated surety, they are to be most strictly construed against the surety, and where the terms of such a bond are susceptible of more than one construction the court will adopt that construction most consistent with the purpose to be accomplished, which would be the construction most favorable to the beneficiary". (Quoting Stearn's Suretyship (3d ed.) and other citations). "Another rule is that, in a statutory bond, the provisions of the statute are read into the bond, and if there are conditions contained in such a bond repugnant to the statute, such conditions are to be treated as surplusage." (Quoting authorities).

See, also, *Indemnity Co. v. Granite Co.*, 100 Ohio S. 373, 126 N. E. 405, where the court says:

> "Unlike an ordinary private surety, a surety of the character here involved, which accepts money consideration, has the power to and does fix the amount of its premium so as to cover its financial responsibility. This class of suretyships therefore is not regarded as 'a fav-

orite of the law'. And if the terms of the surety contract are susceptible of two constructions, that one should be adopted, if consistent with the purpose to be accomplished, which is most favorable to the beneficiary."

See, also, Benedict on Admiralty (4th Ed.) Sec. 433.

The conditions of the bond should be construed against the claimant and surety who drew it, and in favor of the obligee.

American Surety Co v. Pauly, 170 U. S. at 144; 42 L. Ed. at 981.

10. The bond in question, given for the release of the "Dauntless" comes within Sec. 941 of the Revised Statutes, and the surety is bound to abide the decree of the court in the cause.

Benedict, Sec. 433;

Monks v. Miller, 66 Fed. 571.

The bond in question can not be considered as a stipulation because it is not conditioned in any respect as are stipulations in admiralty, and the only bond authorized for the release of a vessel under the admiralty practice is the bond in compliance with Sec. 941 of the Revised Statutes, the material portion of which section is as follows:

"SEC. 941. (Delivery bond in admiralty proceedings—permanent bond by vessel owner). When a warrant of arrest or other process *in rem* is issued in any cause of admiralty jurisdiction, except in cases of seizures for forfeiture under any law of the United States, the marshal shall stay the execution of such pro-

> cess, or discharge the property arrested if the process has been levied, on receiving from the claimant of the property a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge of the court where the cause is pending, or, in his absence, by the collector of the port, conditioned to answer the decree of the court in such cause. Such bond or stipulatioin shall be returned to the court, and judgment thereon, against both the principal and sureties, may be recovered at the time of rendering the decree in the original cause."

Having been given for a purported compliance with the statute, the conditions imposed by the statute must be read into the bond.

11. Emphasis is laid by the Honorable Trial Court upon the stipulation signed by the proctors for the respective parties for the return of the vessel to the marshal. A reading of the stipulation heretofore noted (Apostles, p. 28) must convince this Honorable Court that the purpose thereof was to avoid further possibility of deterioration, cost or damage, and not in any manner to affect the liability of the claimant and surety to the libellant, at least in the view of the libellant at the time of signing the stipulation.

At the time the order for return of the vessel was made by the court, August 15th, said vessel was then in the possession of the marshal under monition issued under the libel of C. R. Hooper.

Apostles, p. 46.

So that the order for redelivery did not in fact accomplish its purpose because the vessel was then in the custody of the marshal, an officer of the court, under the Hooper libel, and it certainly can not be contended that the surety can be relieved of its responsibility on the delivery bond given for the release of the vessel issued under the original libel by a technical return or surrender of the vessel when at the time of her purported delivery back to the marshal, she was already in the possession of the marshal.

It is, therefore, respectfully submitted that the court erred in releasing the surety from its obligation to pay the judgment rendered by the court in favor of the libellant, Seattle Shipbuilding & Dry Dock Company.

PHILIP D. MACBRIDE,
Proctor for C. R. Hooper, doing business as Hooper Manufacturing Company.

PHILIP D. MACBRIDE,
Proctor for L. H. Coolidge and C. V. Hull, co-partners as L. H. Coolidge Company.

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BRIEF OF APPELLEES

The proctors for the respective parties have stipulated that the sole and only question on appeal is the decision of the court that the surrender of the

vessel by the claimant satisfied and discharged the delivery bond, executed by the claimant and the Fidelity and Deposit Company of Maryland (Apostles, p. 72). The Steamship "Dauntless" was libeled at the instance of the Seattle Shipbuilding & Dry Dock Co. on July 19, 1923, and custody taken by the marshal under process. On July 20, 1923, a claim was filed by the Kunkler Transportation & Trading Company, and a delivery bond for the release of the vessel was filed on the same day with the claimant as principal and the Fidelity and Deposit Company of Maryland as surety. The bond in part recites:

> "And Whereas, it is agreed between the proctors of the libellant and the proctors of the claimant of said vessel that upon the giving of a bond, with surety, in the sum of Six Thousand Dollars ($6,000.00), said vessel may be released. * * *
>
> "The condition of the above obligation is such, however, that if the above-bounden principal shall either pay any judgment and abide by any and all orders and decrees made by said court in the above-entitled cause or in lieu thereof shall redeliver said vessel, with her tackle, apparel and furniture, into the possession of said marshal, and abide by any such judgment as the same may be rendered, or any orders as the same may be made, then this obligation be void; otherwise to be and remain in full force and effect."

This bond was submitted to and *approved* by the proctors for the libellant, subsequently approved by the court and the vessel released. On August 7, 1923, the claimant and surety, in compliance with the terms of the bond, tendered the vessel to the marshal, who declined to receive the same under instructions from the proctors for libellant. On August 15, 1923, the court, pursuant to stipulation of the parties, dated August 8, 1923, (Apostles, p. 28) ordered the marshal to accept the custody of the vessel.

It is contended by the appellants that this bond is a statutory bond given pursuant to Section 941 of the revised statutes. The pertinent portion of said section follows:

> "Sec. 941. (Delivery bond in admiralty proceedings—permanent bond by vessel owner). When a warrant of arrest or other process *in rem* is issued in any cause of admiralty jurisdiction, except in cases of seizures for forfeiture under any law of the United States, the marshal shall stay the execution of such process, or discharge the property arrested if the process has been levied, on receiving from the claimant of the property a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge of the court where the cause is pending, or in his absence, by the collector of the port, conditioned to answer the decree of the court in such cause. Such bond or stipulation shall

> be returned to the court, and judgment thereon, against both the principal and sureties, may be recovered at the time of rendering the decree in the original cause."

The bond given is clear and plain in terms; was not intended to and does not purport to comply with the above statute; it does not refer to the statute; it is not conditioned as the statute requires and is not given in double the amount of libellant's claim. In *Fidelity & Deposit Company of Maryland v. Duke*, 293 Fed. 661, Judge Bourquin, speaking for this court says:

> "In so far as the bonds to the bank are concerned, the evidence is insufficient to characterize them as statutory * * * The distinction between statutory and common law bonds cannot be ignored and is that the first conform to the statute, and the latter do not, even though so intended. (*City of Mount Vernon v. Brett*, 193 N. Y. 276; 86 N. E. 10). The character of the bond is determined by its terms and the circumstances of its execution."

The purpose of Section 941 is to afford the claimant an absolute statutory means of securing the release of a vessel. A claimant, if he chooses this method, does not need to call in the libellant in order to secure the release, but gives the bond direct to the marshal, conditioned as the statute requires, in an amount double the libellant's claim with approved surety. The marshal is the sole judge of the sufficiency of this form of bond and in practice re-

quires a literal and strict compliance with the statute. In admiralty practice and usage this kind of bond is rarely given. The bond given is usually made under the rules of the court or upon agreement of the parties.

Sec. 917 of the revised statutes (Barnes Code, 1287) provides:

> "Section 1287. Power of the Supreme Court to regulate the practice of district courts.—The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the circuit and district courts. (R. S. Sec. 917; Act Aug. 23, 1842, c. 188, Sec. 6, 5 Stat. 518)."

Of admiralty rules adopted by the Supreme Court under the above statute, the following should be mentioned:

> "Rule 12. Where any ship shall be arrested, the same shall, on the application of the claimant, be delivered to him either on a due appraisement, to be had under the direction of the court, *or on his filing an agreement in writ-*

ing to that effect signed by the parties or their proctors of record, and on the claimant depositing in court so much money as the court shall order, or on his giving a stipulation for like amount, with sufficient sureties, or an approved corporate surety, conditioned as provided in the foregoing rule."

"Rule 6. All bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before the clerk or a deputy clerk or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court or before any commissioner of the United States authorized by law to take bail and affidavits in civil cases, *or otherwise by written agreement of the parties or their proctors of record.*"

Rule 21 of the District Court admiralty rules provides that property seized by the marshal may be released in five different ways, the last method being "by an order duly entered upon the written consent of the proctor for the party or parties on whose behalf the property is detained."

Rule 58 provides:

"Stipulations, mitigation of. The court, on satisfactory proof of the inability of the party to comply with the usual stipulations in a cause, may mitigate and modify such stipulations conformably to the equities or exigencies of the case. (Adm. Rule, Supreme Court, 6)."

Under the above statute, (R. S. 917) and the admiralty rules of the District and Supreme Court pursuant thereto, the District Court possesses the authority to release the *res* under the bond here given, which admittedly is not the usual bond conditioned for the payment of the judgment, but given in the alternative for the payment of the judgment or the safe return of the *res*. Particularly is this true where the bond recites that it was made upon agreement of the parties and bore the written approval of the proctors for the libellant, before being submitted to the court. In other words, it purports itself to be and is a bond given by agreement and not under statute.

Proctors for the libellant in their oral argument, state that the bond was approved by them through inadvertance or by mistake, and that they were under the impression that a statutory bond was being given. The bond is so plain in terms that the most casual reading would show that it is not a statutory bond but a common law obligation. It would be most unjust to permit libellant to take advantage of its own mistake or carelessness and treat this as a statutory bond as contended for and thereby wholly destroy the effect of the alternative condition and in fact write an entirely new contract for the surety which it never intended to enter. The bond is essentially a common law bailment with the condition that the *res* would be redelivered or the judgment paid. There is the alternative in the

undertaking, which being performed, acquits the obligation.

From an equitable standpoint the libellant is in exactly the same position and in no worse position than if the bond had never been given. The libellant furnished the repairs upon which its libel is founded upon security of the vessel. The vessel was redelivered in the same condition as seized to answer claim of libellant. No physical deterioration of the vessel or additional charges or encumbrances while out on bond were shown or contended for. Unfortunately the sale of the vessel did not bring sufficient to satisfy in full libellant's claim and other claims. However, all of the other claims existed at the time and were created prior to the original seizure by the marshal at libellant's instance.

When we refer herein to the libellant we mean the Seattle Shipbuilding & Dry Dock Company, as the bond was for the benefit of such libellant and it is elementary and so conceded in appellant's brief that none of the other intervening libellants have any claim against the bond. (Benedict's Adm. 4 Ed. par. 409).

Appellants rest their principal contention upon the proposition that, if the vessel was once discharged, the court had no power to order its redelivery to the marshal. In every case cited by appellants, the bond was an absolute undertaking to pay the judgment; they have failed to cite a single authority where the bond was in the alternative and the release therefore conditional. However,

there are many instances in admiralty where the authority of the court to re-arrest a vessel once discharged upon bond has been upheld. The general rule being, that in cases of fraud or mistake, or when the *res* has been improvidently released, the court possesses ample power to order its return to the custody of the marshal.

The Thales, 3 Ben. 327 Fed. Cas. No. 13855;

Livingston v. The Jewess, 1 Ben. 21, note Fed. Cas. 8412;

The Virgo, 13 Blatchf. 225 Fed. Cas. No. 16976;

The Favorite, 2 Flipp. 86 Fed. Cas. No. 4698;

2 Parsons Shipping & Admiralty 411;

United States v. The Haytian Republic, 154 U. S. 117, 38 L. Ed. 930;

United States v. Ames, 89 U. S. 35, 25 L. Ed. 295;

The Three Friends, 166 U. S. 68, 41 L. Ed. 920;

Braithwaite v. Jordan, 5 N. D. 213, 31 L. R. A. 246, 65 N. W. 706.

In *The Union*, 4 Blatchf. 90 Fed. Cas. 14346, cited by appellants, the court says:

> "I agree that if there has been any mistake or fraud connected in entering into the stipulation and the vessel has been improvidently discharged, it would be competent for the court to relieve the parties concerned on application,

within a reasonable time, by ordering the vessel back into the custody of the officer."

In *The Favorite*, 2 Flipp. 86, Fed. Cas. 4698, the court mentioned certain cases cited by the appellant, and states:

"It is claimed, however, that the vessel, having once been released from custody is forever discharged of the lien and the court has no power to order her re-arrest. *The Union* (Case No. 14346), *The White Squall* (Fd. 17570), *The Kalamazoo*, 9 Eng. Law & Eq. 587, *The Old Concord* (Case No. 10482). In none of these cases, however, was there any mistake or fraud at the time the stipulation was signed. In *The Union* and *The Kalamazoo*, the amount of damages claimed in the libel was increased. In *The White Squall* the vessel was returned to custody by consent of the parties, against the protest of a person having an interest in the vessel; and in *The Old Concord* the sureties had become insolvent. Conceding that the court has no power to order the re-arrest of a vessel once fairly discharged upon a binding stipulation or for a cause not existing at the time of the stipulation was accepted, I am clearly of the opinion that this power exists, whenever through mistake or fraud a stipulation has been accepted which was not binding upon the parties signing it. An order will be made for the re-arrest of the vessel."

In the instant case the vessel was remanded to the custody of the marshal by order of the court pursuant to a written stipulation of the parties (Apostles pp. 28 and 30). Without this stipulation undoubtedly the court sitting in admiralty under its recognized and established equitable powers would upon the seasonable application of the surety have ample jurisdiction to recall the vessel under the authorities above cited, upon the theory that the release of the vessel under the bond as conditioned was improvident.

There are many instances where courts of admiralty have enforced bonds not as statutory bonds but as common law obligations. In *The Alligator*, 1 Gall. 145, Fed. Cas. 248, the property was delivered to the claimant by order of the district court upon bond being given to respondent in the appraised value in case of final condemnation. It was contended the court had no authority to deliver the property on bond as unwarranted under the statute upon which the case was being prosecuted.

Judge Story says:

> "Whether there be any statute existing which authorized the delivery on bond or not is not in my judgment material. This cause was a civil cause, of admiralty and maritime jurisdiction, and nothing can be better settled, than that the admiralty may take a fidejussory caution or stipulation in cases in rem, and may in a summary manner award judgment

and execution thereon. The District Court possessing this jurisdiction and being fully authorized to adopt the process and modes of proceeding of the admiralty (*Respublica v. Lacaze*, 2 Dall (2 U. S.) 118. See also (*Brymer v. Atkins*, 1 H. Bl. 164), had an undoubted right to deliver the property on bail and to enforce a conformity to the terms of the bailment. In what manner this security is taken, whether by a sealed instrument or by a stipulation in the nature of a recognizance, cannot affect the jurisdiction of the court. Without doubt, unless a different rule were prescribed by statute, the best course would have been to take an admiralty stipulation, But a bond, even supposing it were void, as such, which is not admitted might yet be good as a stipulation. In all cases of this nature, the security whatever may be its form, is taken by order of court upon the voluntary application of the party, and therefore is *apud acta.* Having jurisdiction of the principal cause, the court must possess jurisdiction over all the incidents, and may by monition, attachment or execution, enforce its decrees against all who become parties to the proceedings."

While the appellants have been unable to find a single authority that deals in the alternative bond, supporting their contention, the following are in point and directly to the contrary. In the case of *Bell and Casey v. Thomas*, 8 Ala. 527, the bond for

the delivery of the vessel was conditioned to deliver the steamboat to the sheriff at a certain time or to pay and satisfy such judgment as should be rendered on the libel. Judgment for condemnation and also against the stipulators on the bond was rendered by the trial court. The Supreme Court of Alabama reversing the lower court held that the judgment against the stipulators on the bond was premature, "inasmuch as the condition of the bond is to deliver the boat to the sheriff on a particular day or to pay the judgment of the court * * * it is essentially different from a stipulation to pay the amount for which judgment shall be rendered * * * It is not important to inquire whether the bond taken is in precise conformity with that required by the statute, and if it was variant from that, and could only be supported by it as a common law obligation, yet it is within the jurisdiction of a court proceeding, according to the course of admiralty practice to render judgment on such an obligation as an incident to the principal cause." In *Murphy v. Roberts and Staples*, 30 Ala. 232, the Court, on a similar state of facts, says:

> "The bond required by the statute is 'to pay such judgment as shall be rendered.' The bond given was to pay the judgment, or to 'have forthcoming, and well and truly deliver, said steamboat,' etc., 'to answer such decree, sentence and judgment as may be rendered against her.'
>
> "The admiralty practice in the United States

is intended to be simple and summary. * * * The judgment against the stipulators in this case was premature. The legal effect of their bond was, that they would have the steamboat, her tackle, apparel and furniture, forthcoming for the payment of such judgment as should be rendered in the cause, or that they would pay the judgment themselves. They had the option of doing the one or the other, and they were under no obligation to do either, until judgment of condemnation was rendered against the boat. * * * The judgment should not have been rendered against the stipulators, until they were placed in default, by a failure to deliver the property which their bond required them to deliver. The circuit court could not safely anticipate their failure to comply; and hence should not have pronounced a prospective judgment against them."

Lane v. Townsend, Fed. Cas. 8054, was a proceeding in admiralty where the person of the respondent was attached under process. The bond was conditioned that the respondent should appear and answer to the process and should abide and perform the judgment of the court. The plaintiff secured a money judgment, and the surety on the bail bond committed the principal to jail and claimed release thereby. The court, in a lengthy and well considered opinion, exonerates the surety and in part states:

"The stipulation ordinarily required in per-

sonal actions, that in *judicio sistendi*, answers more nearly to special bail than Blackstone supposed. Its object was substantially the same and nothing more, that of sustaining and rendering effectual the jurisdiction of the court against the person of the defendant. It was no part of its object to enable the actor to receive his debt of the fidejussors. When that was intended, a different stipulation was required. When its objects were substantially attained, the equity of the praetor relieved the fidejussors against the words of the instrument. If then the court is to be governed by the spirit of that jurisprudence, which is admitted to have exercised a controlling influence in regulating its practice, the inquiry will be, whether the plaintiff has had substantially the benefit of this stipulation. The person of the respondent in the original libel was surrendered as soon as the fidejussors were called on by legal process to surrender him, and the libellant has had an opportunity of taking him in execution, if he had chosen to do it. The courts of common law hold this to be a sufficient compliance with the condition of a bail-bond to discharge the bail. It is said, indeed, that in this case their discharge is *ex gratia* and not *ex debito justitiae*. But what was once favor and indulgence, by the practice of the court has been converted into a right. In this state, from the earliest period of its judi-

> cial history, the bail could always surrender the principal on *scire facias*, as a matter of right. This clear and strong expression of professional opinion, indicated by the uniform practice of the courts, that a surrender on the *scire facias* is such a performance of the condition of the bond, as in equity should discharge the bail, carries with it an authority not easily resisted. And if it is held sufficient to exonerate the bail by the courts of common law, it should, by at least as strong a reason, be so held by a court of admiralty, which professes to administer justice *ex aequo et bono* in the liberal spirit of a court of equity."

The appellants further rely upon the final part of the condition of the bond: "The principal shall *either* pay any judgment * * * and abide * * * by any * * * decree, or in lieu thereof, shall redeliver said vessel and abide by any such judgment as the same may be made."

The terms are plain and explicit and the intention to either pay the judgment or return the vessel could not be made clearer. Undoubtedly under the terms of this bailment, if the vessel was damaged while out under bond, or additional liens or charges were created against her, the surety, under this final clause of its bond, would be compelled to make these good. However, such is not the case. The vessel was redelivered in the same condition and the libellant suffered no loss due to her temporary release.

In conclusion, may be quote from Judge Neterer's

decision, and we are unable to make a better statement of the whole than the following:

> "This order having been entered pursuant to the agreement of the parties (there being nothing in the law prohibiting it), and the vessel having been returned in obediance to the stipulation, the parties may not now avoid the alternative provision of the stipulation. The court may not make a contract. The recitals in the bond are conclusive. The purpose for which it was given is plain. The intent of the parties appears clearly to be in the alternative, and having been agreed to by the proctors for the libellant and approved by the court the jurisdiction of the court extends to the *rem* to the extent that the vessel may be returned to the marshal pursuant to the stipulation in the bond, and if the vessel is in the same condition that it was when released the exemption must obtain. That the liens attached when the vessel was released is established. There is no testimony of physical deterioration. All of the lien claimants are in the same situation as if the stipulation had not been given, and have gained the keepers expense for the time the vessel was out of the marshal's custody. The court no doubt had jurisdiction to direct the marshal upon the record in this case to receive the ship under the terms of the bailment."

We respectfully submit that judgment of the

District Court in releasing the surety should be affirmed.

GRINSTEAD, LAUBE & LAUGHLIN,
Proctors for Fidelity and Deposit Company of Maryland.

HARTMAN & HARTMAN,
Proctors for Kunkler Transportation & Trading Company.

No. 4303

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN RANTALA,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of the Record

Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.

CAXTON PRINTERS, CALDWELL 26367

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

JOHN RANTALA,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of the Record

Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

R. B. NORRIS,
St. Maries, Idaho,
Attorney for Plaintiff in Error.

E. G. DAVIS,
U. S. District Attorney,

W. H. LANGROISE
and J. F. AILSHIE, JR.,
Assistant U. S. District Attorneys,
Boise, Idaho,
Attorneys for Defendant in Error.

INDEX

INDEX TO BILL OF EXCEPTIONS

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION.

No. 2088

INFORMATION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTTI HOISKA,

Defendant.

E. G. Davis, United States Attorney for the District of Idaho, who for the United States in this behalf prosecutes in his own proper person comes into Court on this 16th day of May, 1924, and with leave of the Court first had and obtained upon his official oath gives the Court here to understand and be informed as follows:

COUNT ONE

(Possession)

That Antti Hoiska, late of the County of Shoshone, State of Idaho, heretofore, to-wit, on or about the 7th day of May, 1924, at Mullan, Idaho, in the said County of Shoshone, in the Northern Division of the District of Idaho and within the

jurisdiction of this Court, did then and there wilfully, knowingly and unlawfully have in his possession certain intoxicating liquor containing more than one-half of one per cent of alcohol, to-wit, certain spirituous liquor commonly known as "moonshine whiskey", the exact amount to this informant unknown, the same being designed, intended and fit for use as a beverage, the possession of same being then and there prohibited and unlawful and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT TWO

(Nuisance)

That Antti Hoiska, late of the County of Shoshone, State of Idaho, heretofore, to-wit, on or about the 7th day of May, 1924, at Mullan, Idaho, in the said County of Shoshone, in the Northern Division of the District of Idaho and within the jurisdiction of this Court, did then and there wilfully, knowingly and unlawfully maintain, keep and operate that certain place occupied by Antti Hoiska, and situated in the village of Mullan, Shoshone County, Idaho, and run as a Soft Drink and Card Room, as a public and common nuisance, to-wit, as a place where intoxicating liquors containing more than one-half of one per cent of alcohol, to-wit, certain spirituous liquors commonly known

as "moonshine whiskey", the same being designed, intended and fit for use as a beverage were sold, kept and bartered, said acts and things herein charged being then and there prohibited and unlawful and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

E. G. DAVIS,
United States Attorney for
the District of Idaho.

United States of America,
District of Idaho,
Northern Division. } ss.

William H. Langroise, being first duly sworn on his oath deposes and says: That he is a duly appointed, qualified and acting Assistant United States Attorney for the District of Idaho, and that he makes this verification as such; that he has read the above and foregoing Information, knows the contents thereof, and that the facts and things therein stated are true.

WILLIAM H. LANGROISE,

Subscribed and sworn to before me this 16th day of May, 1924.

(SEAL)

W. D. McREYNOLDS,
Clerk of the U. S.
District Court.
By M. FRANKLIN, Deputy.

Leave is hereby granted to file the foregoing Information.

FRANK S. DIETRICH,
District Judge.

Endorsed, Filed May 17, 1924.
W. D. McREYNOLDS, Clerk.
By M. FRANKLIN, Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

No. 2089

INFORMATION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN RANTALA,
Defendant.

E. G. Davis, United States Attorney for the District of Idaho, who for the United States in this behalf prosecutes in his own proper persons comes into Court on this 16th day of May, 1924, and with leave of the Court first had and obtained upon his official oath gives the Court here to understand and be informed as follows:

COUNT ONE

(Possession)

That John Rantala, late of the County of Shoshone, State of Idaho, heretofore, to-wit, on or about the 7th day of May, 1924, at Mullan, Idaho, in the said County of Shoshone, in the Northern Division of the Dsitrict of Idaho and within the jurisdiction of this Court, did then and there willfully, knowingly and unlawfully have in his possession certain intoxicating liquor containing more than one-half of one per cent of alcohol, to-wit, certain spirituous liquor commonly known as "moonshine whiskey", the exact amount to this informant unknown, the same being designed, intended and fit for use as a beverage, the possession of same being then and there prohibited and unlwaful and he, the said John Rantala, having theretofore and on the 19th day of November, 1923, in the District Court of the United States, in and for the District of Idaho, Northern Division, at Coeur d'Alene, Idaho, plead "guilty" to the charge of having in his possession certain intoxicating liquor containing more than one-half of one per cent of alcohol, to-wit, certain spirituous liquor commonly known as "moonshine whiskey" the exact amount to this informant unknown, the said defendant having been at said time and said place duly and regularly sentenced on said plea, by the Judge of said Court, all of which was, and is, contrary to the form of the statute in such case made and provided, and

against the peace and dignity of the United States of America.

COUNT TWO

(Nuisance)

That John Rantala, late of the County of Shoshone, State of Idaho, heretofore, to-wit, on or about the 7th day of May, 1924, at Mullan, Idaho, in the said County of Shoshone, in the Northern Division of the District of Idaho and within the jurisdiction of this Court, did then and there wilfully, knowingly and unlawfully maintain, keep and operate that certain place occupied by John Rantala, and situated in the village of Mullan, Shoshone County, Idaho, and run as a Soft Drink and Card Room, as a public and a common nuisance, to-wit, as a place where intoxicating liquor containing more than one-half of one per cent of alcohol, to-wit, certain spirituous liquors commonly known as "moonshine whiskey", the same being designed, intended and fit for use as a beverage, were sold, kept and bartered, said acts and things herein charged being then and there prohibited and unlawful and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

E. G. DAVIS,
United States Attorney for
the District of Idaho.

United States of America,
District of Idaho, } ss.
Northern Division.

William H. Langroise, being first duly sworn on his oath deposes and says: That he is a duly appointed, qualified and acting Assistant United States Attorney for the District of Idaho, and that he makes this verification as such; that he hac read the above and foregoing Information, knows the contents thereof, and that the facts and things therein stated are true.

WILLIAM H. LANGROISE.

Subscribed and sworn to before me this 16th day of May, 1924.

W. D. McREYNOLDS,
Clerk of the U. S. District Court.
By M. FRANKLIN, Deputy.

Leave is hereby granted to file the foregoing Information.

FRANK S. DIETRICH,
(SEAL) District Judge.

Endorsed, Filed May 17, 1924.
W. D. McREYNOLDS, Clerk.
By M. FRANKLIN, Deputy.

(Title of Court and Cause)

MINUTE ENTRIES

At a stated term of the District Court of the United States for the District of Idaho, Northern Division, held in Coeur d'Alene within said Division, on May 31, 1924, and on other dates as stated herein, the following proceedings, among others, were had, to-wit:

TRIAL. VERDICTS.

JUDGMENT OF HOISKA

Upon agreement of counsel it was ordered that causes No. 2088 and 2089 be, and the same hereby are consolidated for trial.

The defendant's petition for an order suppressing the use in evidence of certain property taken on search warrant was denied by the Court without prejudice, the defendants being allowed exception to the order.

This cause came on for trial before the Court and a jury, J. F. Ailshie, Jr., Assistant District Attorney, appearing for the United States, the defendants being present with their counsel, R. B. Norris, Esq. The Clerk, under direction of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper, to secure a jury. H. R. McBride, Andrew Elfstein, and Geo. Young, whose

names were so drawn were excused on defendant's peremptory challenge; following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified, and who were sworn to well and truly try said cause, and true verdicts render, to-wit:

Amis Day, T. R. Gerdes, Henry Brugger, H. H. Hammond, Ed. Bradbury, John Campfield, Geo. B. Welsh, Geo. T. Nitkey, W. W. Brannon, Oscar L. Sheffield, T. J. Tanley, and W. L. Gass.

The informations were read to the jury by the Assistant District Attorney who informed them of the defendants' pleas entered thereto, whereupon Frank M. Marler, J. D. Foster, Paul Reynolds, T. L. Quarles, and George R. Wesser were sworn and examined as witnesses and here the plaintiff rests.

John Rantala, E. W. Lesser, Eli Nimi, Arthur Havern, Frank Horn, Antti Hoiska were sworn and examined as witnesses on the part of the defendants, and here the defendants rest. On rebuttal J. D. Foster was recalled and further examined on the part of the plaintiff, and here both sides close.

The cause was argued before the jury by counsel for the respective parties, after which the court instructed the jury and placed them in charge of John Graff, a bailiff duly sworn, and they retired to consider of their verdicts.

On the same day the jury returned into court, the defendants and counsel being present, whereupon, the jury presented their written verdicts, which were in the words following:

(Title of Court and Cause)

VERDICT NO. 2088

"We the jury in the above entitled cause, find the defendant Antti Hoiska guilty on the first count and guilty on the second count, as charged in the information.

F. R. GERDES, Foreman."

(Title of Court and Cause)

VERDICT No. 2089.

"We the jury in the above entitled cause, find the defendant, John Rantala, guilty on the first count, and guilty on the second count as charged in the information.

F. R. GERDES, Foreman."

The verdicts were recorded in the presence of the jury, then read to them, and they each confirmed the same.

It was announced to be the judgment of this Court that the defendant Antti Hoiska pay a fine

of $500.00 and be confined in the Shoshone County Jail for a term of six months. Nine o'clock A. M. June 5th was fixed as time for pronouncing judgment on defendant John Rantala.

June 7th, 1924.

JUDGMENT OF JOHN RANTALA

Comes now the District Attorney with the defendant and his counsel into court,

Whereupon, the defendant's motion for a new trial was presented by his counsel, and submitted for consideration. Whereupon, the Court denied said motion. The defendant thereupon presented a motion for arrest of judgment, which was also denied by the Court.

It was thereupon announced to be the judgment of this court that the defendant pay a fine of $500.00 and be confined in the Kootenai County Jail for a term of six months, and until such fine be paid.

The defendant was allowed thirty days in which to prepare a bill of exceptions, and permitted to go upon the filing of a bond in the sum of $1500.00.

BILL OF EXCEPTIONS
(Of John Rantala)

BE IT REMEMBERED, that the above entitled cause came on regularly for trial before the Hon. Frank S. Dietrich, judge of said Court, and a jury

being empaneled, James F. Ailshie, Jr., Esq., appearing as Counsel for the United States of America, plaintiff and R. B. Norris, appearing as counsel for John Rantala defendant.

Whereupon the following proceedings were had, to-wit:

Here follows the entire testimony taken at the trial including statements to the jury of the respective counsel and instructions to the jury given by the Court as prepared by the Court Reporter, as follows, to-wit, and also objections to the introduction of testimony as shown therein.

(The information and minutes of the Court and all matters of record in said action not herein mentioned and set out are omitted.

(Service acknowledged.)

No. 2088
No. 2089
(Consolidated cases.)
JAMES F. AILSHIE, JR., Attorney for Plaintiff,
R. B. NORRIS, Attorney for Defendant.

This cause came on for trial at 9 o'clock A. M., Saturday, May 31, 1924, at Coeur d'Alene, Idaho, before Hon. Frank S. Dietrich, judge of the above-entitled court, and a jury, whereupon the following proceedings were had, to-wit:

MR. AILSHIE: Gentlemen, the substance of the informations filed in this case was given you by Mr. Langroise, and to these informations the defendants have each pleaded not guilty.

I think at this time I might read the stipulation, Mr. Norris. I believe there is a stipulation which—

MR. NORRIS: The same stipulation was made in the other case, in regard to a former conviction, Your Honor, and I am not bound, however, to waive any right with respect to the sufficiency of the testimony otherwise.

MR. AILSHIE: It is stipulated that John Rantala heretofore, on the 19th day of November, 1923, at Coeur d'Alene, Idaho, pleaded guilty to the charge of having in his possession intoxicating liquor containing more than one-half of one per cent of alcohol, the said defendant having been at said time and said place duly and regularly sentenced on said plea by the judge of said court.

That, gentlemen, is a stipulation, I might explain. It is agreed between the parties that that is true.

The proof, gentlemen, will be that on May 7th of this year the federal prohibition agents, Marler and Reynolds, together with Mr. Foster, of the Department of Law Enforcement of the State of Idaho, conducted a search of the place of John Rantala and Antti Hoiska, which is located at Mullan;

that as they went in John Rantala poured out a quart container into a sink or basin; that agent Marler went back there and recovered a small portion of it; that the receptacle from which it had been poured smelled of moonshine whiskey; that he also took a quantity of this that had been poured out into the sink, the sink at that time containing considerable water, and that he examined that and that it was moonshine whiskey. This place was conducted jointly by Rantala and Hoiska.

FRANK MARLER, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. AILSHIE:

Q. State your name and place of residence.

A. Frank Marler, Wallace, Idaho.

Q. Do you hold an official position, Mr. Marler?

A. Federal prohibition agent.

Q. And how long have you held that position?

A. Two years and a half.

Q. Where are you now stationed?

A. Wallace.

Q. And how long have you been there?

A. About two months.

Q. Mr. Marler, did you ever conduct a search of the premises known as the Rantala and Hoiska place, at Mullan?

A. Yes, sir.

Q. When was that?

A. On May 7th.

Q. Of this year?

A. Yes.

Q. Who was present at the time you conducted this search?

A. Agent Reynolds and Jack Foster, of the State Constabulary, and myself.

Q. What time of the day was it?

A. About 3 P. M.

Q. I wish you would just describe this place.

A. Why, Agent Reynolds and myself, dressed as miners, went with the rest of the—went to Wallace with Jack Foster and stopped at the top of the hill where you go into Mullan. Mr. Foster pointed his place out, that we had a federal search warrant for, and pointed the place out to us, and when the miners coming off shift from the Morning mine, a lot of them come down from the mine—

MR. NORRIS: I object to that, about the miners coming off shift, as immaterial.

MR. AILSHIE: It is preliminary, Your Honor.

THE COURT: You may proceed.

A. (Continuing) With the miners coming down, we walked down town and into Mr. Rantala's place and Mr. Hoiska's place, and just walked in, and Mr. Reynolds walked to the back of the room,

and I walked to the bar and turned the corner of the bar. As I come in Rantala was standing behind the bar, about four or five feet up from the the end. As I turned the corner of the bar and started toward Mr. Rantala he was leaning on the bar, and he just dropped his arm off the bar and knocked a quart jar of liquid into the sink, and at the same time pulled the stopper from the sink, and it was quite a large sink, made of 1x12's, and quite a quantity of water in it; and as he did that I jumped toward him and handed him the search warrant and told him I was an officer, and grabbed the quart jar, and he attempted to push it out of my hand again, and I shoved him back and set the —got the jar so I could hold it, and just at this time, about that instant, Mr. Foster came in, and I set the jar up on top of the bar and told Jack to keep it there. There was, oh, somewhere around an inch of liquid in the jar at that time, and when I first saw it, before he had knocked it over, it was probably half full, and of course when it fell into the water it scooped up,—the jar fell over and part of the liquid fell out, and when I grabbed it some water come up in it, but we retained that. And we searched the rest of the place, and that was all the liquor we found. In the back, in a sink, Mr. Reynolds—there was a sink in the back of the room, just a common, ordinary metal sink in the back, with the card tables, and there Mr. Reynolds found

four small glasses. And we retained the whiskey and took it to Spokane and had it tested.

Q. Mr. Marler, are you able to state what that jar contained?

MR. NORRIS: We object, unless he knows, Your Honor. He says he had it tested.

THE COURT: Well, you need not state the result of the test, but if he knows what it contained, aside from the test, he may state.

A. It contained moonshine whiskey.

Q. What color was it?

A. White.

Q. Mr. Marler, did you find anything else there?

A. Not in the way of whiskey, no,—that was all.

Q. You didn't find any glasses or anything of that nature?

A. Just the four glasses I think that was found in the rear sink, at the rear of the room.

Q. Mr. Marler, previous to this time, that is, the 7th of May, had you ever watched that place?

A. Not myself, no.

Q. At the time you were behind the bar, where was agent Reynolds?

A. He was at the rear of the room, by the rear sink.

Q. Did you have any conversation with the defendant Hoiska at that time?

A. After I had gotten hold of the jar he come up and asked about the search warrant and wanted to know why I didn't serve it on him, and why we didn't read it, and matters of that kind.

Q. Did he make any statement as to why it should be served on him?

A. He said he ran the place, that the stock was his and he ran the place there.

Q. Mr. Marler, do you know the reputation of the place known as the Rantala and Hoiska place at Mullan?

A. I do.

Q. In reference to its being a place where intoxicating liquors are kept, sold or bartered, with particular reference to the months immediately preceding May, 1924?

MR. NORRIS: Wait a minute, if Your Honor please, I think we will object to this.

THE COURT: You may answer yes or no.

A. I do, yes.

Q. What is it, good or bad?

A. It is bad.

MR. AILSHIE: You may inquire.

CROSS EXAMINATION

BY MR. NORRIS:

Q. Who did you hear say it was bad, Mr. Marler?

A. Various people around the streets of Mullan, and people who—

Q. Can you mention any of them?

A. I talked to people on that day there.

Q. But the question is, prior to that time.

A. Yes.

Q. You stated that you knew its reputation prior to that time.

A. Yes. Well, that is, prior to that time for a short time while I was there.

Q. Could you mention any of the people that told you prior to that time that this place had a bad reputation?

A. Yes.

Q. Who were they?

A. Mr. Foster, for one.

Q. And he is an officer too that went with you?

A. Yes.

Q. Any others?

A. Mr. Link.

Q. Who?

A. Mr. Link.

Q. Is he here?

A. No, I don't think so.

Q. Any others?

A. Well, I think that is all that I can call the names of.

Q. Now you may describe this property, the front door, where it is located.

A. In the front of the building.

Q. Certainly, but to one side or about the middle?

A. Just,—of this room itself, it is just a little to the side of the middle, to the right of the side.

Q. Not quite in the center?

A. No, not quite.

Q. Where is this bar located with reference to that door?

A. It is located at the front of the building, along the left wall as you go in. The door is nearer the right wall.

Q. The door is nearer the right wall, and the bar is near the left wall as you go in?

A. Yes.

Q. Did you notice anything else besides the bar at one end of it there?

A. A show case.

Q. A kind of a window seat there, isn't there, a window display proposition there?

A. In the front of the window, yes, I think there is one where the window makes a turn.

Q. What is the length of that bar, show case, etc., running back from the front of the building?

A. Oh, I dont know exactly. It is probably twelve or fourteen feet.

Q. How high is this bar, Mr. Marler?

A. The ordinary height of a bar; it would strike you, I imagine, about forty or forty-four inches, somewheres around there.

Q. Forty-four inches, you say?

A. I say forty or forty-four, somewheres in that neighborhood, I imagine.

Q. Where was this jar located when you went in?

A. I didn't see the jar until I turned the corner of the bar, and at that time it was located on the corner of the drain board that empties into the sink.

Q. You couldn't see anything behind that bar until you walked this twelve or whatever number of feet it was back to that end and around?

A. No.

Q. Now, Mr. Marler, are you sure that you saw this man strike that jar and upset it there?

A. Absolutely so.

Q. Are you positive that it had or was about half full of something at that time?

A. Well, it might not have been exactly half full, as far as the liquid goes, but it was just about, I would judge, from the liquid that I seen in it.

Q. How far would the jar be from you when you got around the end of the bar where you could see it?

A. Oh, four or four and a half or five feet.

Q. This liquid was clear, was it?

MR. AILSHIE: If I may interrupt a moment, I will identify the liquid, if you wish.

MR. NORRIS: Well, the liquor that was in it at the time he saw it.

THE COURT: He may answer the question.

A. Well, it wasn't exactly a pure colorless white, but it has some color in it, but not to be a colored liquid.

Q. The liquid you saw in the jar there you say had some color in it?

A. Now, by color I don't mean a color exactly. I mean that it is a shade darker than a pure white.

Q. You mean it wasn't pure white?

A. Yes.

Q. How far were you from this man when you say he struck this jar and knocked it over?

A. Oh, probably four feet.

Q. What kind of a sink was that, about the size of it?

A. Oh, I imagine about twenty-four or twenty-eight inches long and sixteen or eighteen inches wide, and probably ten or twelve inches deep.

Q. How much water was there in the bottom of it?

A. About half full.

Q. About half full. And what did you say the height of it was?

A. About ten or twelve inches.

Q. Then there would be from five to six inches of water in the sink?

A. Thereabouts, I would imagine.

Q. Was there any lid on the jar when it was knocked into the sink?

A. No.

Q. Mr. Marler, could you estimate about what that sink would hold, of water?

A. No, I couldn't. I have no idea. I never took the exact measurements and never figured it up.

Q. This jar when it went into that water, did it fall on its side?

A. Yes.

Q. Now, Mr. Marler, the four glasses that you found there, there was no liquid in any of those?

A. No.

Q. Did this jar that was, you say, thrown into this sink, fill with water?

A. It got some water into it, yes.

Q. About how much do you think?

A. Well, I don't know; there is no way that I could determine that.

Q. Well, when the jar was tipped over there, did a little water run into it?

A. Yes, there was some dipped into it.

Q. You dipped some water into it?

A. No. When I picked it up there was some water in it.

Q. When it fell over there was a little water ran into the jar?

A. Yes.

MR. NORRIS: That is all.

RE-DIRECT EXAMINATION

BY MR. AILSHIE:

Q. Mr Marler, I hand you this jar. Will you examine it and state if you have ever seen it before?

A. I have.

Q. When was that?

A. On May 7, 1924.

Q. And where?

A. At Rantala's and Hoiska's place at Mullan, Idaho.

Q. Is that the jar you have referred to in your testimony heretofore?

A. It is.

Q. Did you examine the contents of that yourself?

A. I smelled of it.

Q. Are you able from that to state what it contains?

A. I am.

Q. What does it contain?

A. It contains moonshine whiskey.

Q. Have you had the custody of is since that time?

A. I had the custody of it until we brought it here the—Reynolds and I brought it here to Coeur d'Alene. Mr. Reynolds took it to Coeur d'Alene and had it tested. Since that time it has been in the custody of Sheriff Quarles.

Q. At the time Mr. Reynolds took it was it in substancially the same condition as when you found it at the Rantala place?

A. It was.

Q. Mr. Marler, are these the glasses to which you referred?

A. Yes, they are.

Q. Where were these found?

A. Those were found by Mr. Reynolds in the rear sink.

Q. Did you see them when they were found?

A. No, I didn't. I saw them after Mr. Reynolds had got them.

Q. What is this, Mr. Marler, if you know?

A. This is the stopper that was in the sink.

Q. About how large was that sink?

THE COURT: How large was what?

MR. AILSHIE: Was the sink.

THE COURT: He has answered that.

MR. AILSHIE: That is all.

RE-CROSS EXAMINATION

BY MR. NORRIS:

Q. You testified, Mr. Marler, did you not, before the examining magistrate up there at Wallace in regard to this matter?

A. Yes.

Q. Now in describing your going up there, didn't you state in substance, "I went to the bar, turned the corner, and up behind the bar, as I turned in to the bar, I saw Mr. Rantala knock something from the drain board into the sink, a puart jar, and pull the cork out of the sink, the stopper." Did you make that statement?

A. Yes.

Q. Well, at the time you made that statement did you know what that something was, that is, as to the liquid contained?

MR. AILSHIE: That is objected to as immaterial.

THE COURT: Sustained.

Q. Now you don't mean, of course, to give the jury to understand that that liquid there is moonshine?

A. It contains moonshine.

Q. You say this jar is in the some condition that it was when you took it away from there?

A. It is. Not when I took it away from there. You mean away from the Hoiska place.

Q. Where you got it there. You claim you got it at Rantala's place.

A. Yes, but when I took it away from there I put this cork in it, and when I got home I put the top on it to keep it from spilling.

Q. That was done in Wallace?

A. The screw top and rubber there was, yes.

Q. Was put on in Wallace?

A. Yes.

Q. May I ask you in what way you determined that this contains moonshine?

A. So far as my personal self goes, by the smell of it.

Q. Was that the only examination you made of it, just to smell of it?

A. Personally, yes.

Q. After you took this jar home how long did it remain in your possession?

A. We brought it to Coeur d'Alene the same day.

Q. Was this jar introduced in that hearing as evidence, up there at Wallace?

A. No.

Q. You took it with you to your home and then how long did it stay there?

A. About fifteen minutes.

Q. And then where did it go?

A. Coeur d'Alene City.

Q. Who brought it here?

A. Agent Reynolds and myself.

Q. Which one of you.

A. Both of us. We had it in the car with us.

Q. Then what did you do with it here?

A. We locked it, left it in the custody of Sheriff Quarles here, and the next day it was taken to Spokane.

Q. How long was it in Mr. Quarles' possession? You say until the next day?

A. Yes, sir.

Q. What did you do with it when you got to Spokane?

A. Agent Reynolds took it to Spokane.

Q. You know nothing about this jar after it was delivered to Quarles here?

A. Not of my own knowledge.

Q. Those glasses there, are they in the same condition that they were when you found them?

A. They are.

Q. You say this jar wasn't exhibited and introduced up there in that hearing?

THE COURT: He has said that twice.

Q. Now, Mr. Marler, in your testimony before that magistrate there, in reply to a question by Mr. Worstel, I believe, didn't you testify in regard to this jar and what you did with it and where you got it, and all about it?

A. Certainly.

Q. Didn't you say in answer to a question there as to who took it to Coeur d'Alene and Spokane, Mr. Reynolds and myself?

MR. AILSHIE: This is immaterial, if Your Honor please.

THE COURT: Sustained.

Q. When was this hearing, with reference to the time you made this raid.

MR. AILSHIE: That is immaterial, if Your Honor please.

THE COURT: Sustained.

Q. Now, Mr. Marler, in your testimony before the commissioner there, you stated that this jar contained 18 per cent alcohol. Had you had any test made at that time?

MR. AILSHIE: That is objected to, if Your Honor please.

THE COURT: Sustained.

MR. NORRIS: That is all.

MR. AILSHIE: That is all, Mr. Marler.

(WITNESS EXCUSED.)

J. D. FOSTER, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. AILSHIE:

Q. State your name and place of residence.

A. J. D. Foster.

Q. Where do you reside, Mr. Foster?

A. Wallace, Shoshone County, Idaho.

Q. You have lived there for some years, have you?

A. I have lived in Wallace about ten years.

Q. Do you hold any position with the State of Idaho, Mr. Foster?

A. I am special agent of the Department of Law Enforcement.

Q. Mr. Foster, did you hold that position the first of this month?

A. Yes, sir.

Q. Did you conduct a search of the place of Andy Hoiska and John Rantala, at Mullan, Idaho?

A. I came in shortly after the boys entered. I didn't assist in the search. I came in and I held the evidence while the boys conducted the search.

Q. When was that?

A. We got there in the afternoon,—I don't remember just what—the fore part of May—just the exact date I don't know.

Q. Who was present when you came in?

A. Mr. Reynolds, Mr. Marler, and the two defendants, there, and I counted eight other parties, and they were coming and going, sometimes eight

and sometimes ten and sometimes more than that, at the time the search was being conducted.

Q. State what occurred when you were present.

A. I followed Mr. Marler or the boys in, and they handed me a jar and some glasses, and I held those, I kept those in my possession until we arrived at Wallace.

Q. Is this the jar to which you refer, Mr. Foster?

A. This is the jar the boys gave me.

Q. Did you come from Mullan to Wallace with agents Marler and Reynolds?

A. Yes, sir.

Q. Did you make any examination of this jar while it was at the Rantala place?

A. Yes, I pulled the plug out. This plug was in it when they gave it to me, and I pulled the plug out and smelled it. That plug was in the jar, and I pulled that out, and I smelled and tasted of the contents of the jar, yes, sir.

Q. Are you able to state what it contained at that time?

A. It contained a solution of moonshine whiskey and water.

Q. It had moonshine whiskey in it?

A. Yes, sir.

Q. Have you ever had any occasion to watch this place?

A. Not this particular place, that is, by watching it, how do you mean?

Q. Well, notice the place in general, or persons coming from it or going into it, anything of that sort?

A. Well, I have known the place, this place, for a long time, of course, but I never watched it at night or watched people coming and going. I was there the day before, looking for some parties in the place, and I have watched it in that way. I was watching who was there and I was keeping general tab on the town of Mullan, for the reason that a strike was being threatened.

Q. Do you know the reputation of this place, Mr. Foster, the Rantala and Hoiska place?

A. Yes.

MR. NORRIS: We object, Your Honor, because the witness has disclosed a lack of knowledge.

THE COURT: Overruled.

MR. AILSHIE: I am asknig for reputation.

THE COURT: Overruled.

MR. NORRIS: He hasn't shown himself qualified to answer.

THE COURT: Do you reside at Mullan, Mr. Foster?

A. I reside at Wallace.

Q. How far is Mullan from Wallace?

A. About seven miles.

Q. Is that located in what is known as the Coeur d'Alenes?

A. Yes, sir.

Q. Mullan?

A. Yes, sir.

Q. How many times have you been in and about Mullan in the last three or four months?

A. Oh, I have been up there, this summer—I drive through or go up there occasionally, probably once or twice a week.

THE COURT: You say this summer. Counsel asked you for the three or four months immediately preceding the 7th of May. That would be in the winter or spring.

A. I go up there sometimes two or three times a week, and sometimes not for two weeks. I haven't kept track.

Q. But you are in and out of there with more or less frequency?

A. Yes, sir.

Q. Have you talked or do you talk with persons who reside in Mullan?

A. Oh, yes; I know pretty near everyone there at Mullan.

Q. Do you know the reputation of the place known as the Rantala and Hoiska place?

THE COURT: That is the place where this jar was.

A. Yes, sir, I do.

Q. In Mullan, in reference to whether or not it is a place where intoxicating liquors are sold or bartered or kept, with particular reference to the month immediately preceding the 7th of May, 1924?

A. It had the reputation—

THE COURT: Just a moment.

MR. NORRIS: We object, if Your Honor please.

THE COURT: Do you know its reputation? Yes or no.

A. Yes, sir.

Q. What is it?

A. Being a place where moonshine whiskey or intoxicating liquors is being sold.

MR. AILSHIE: You may inquire.

CROSS EXAMINATION

BY MR. NORRIS:

Q. Can you mention some people that told you that? Who told you that?

A. Who told me that?

Q. Yes.

A. My own observation and general—people that I have talked with.

Q. Are you basing this statement of knowledge of reputation on your observation there yourself?

A. And people I have talked with, yes, sir.

Q. Who did you talk with?

A. I have talked with the village officials of Mullan.

Q. Who are they?

A. Mr. Dooley, the chief of police there.

Q. Is he here?

A. No, he isn't, not that I know of.

A. Is that all?

A. Oh, I have talked with various ones. I have been discussing this joint for some little time, and we have had a strike, and it was the headquarters of the strike, and I have been discussing it with the citizens there generally.

Q. I don't doubt that at all, but I was trying to get from you, though, Mr. Foster, the names of the parties who gave you this information.

A. The parties that gave me the information?

Q. Yes, about this being a place where they sold moonshine. You say you partially base your statement upon information that parties gave you and mentioned one man, the policeman there.

A. I don't believe it is necessary, if a man comes and makes a complaint to me, to tell his name. It is not customary, as I understand it.

Q. You decline to give any further names, then?

A. The men that told me, yes, sir; I decline to mention these men's names. They are in business there.

Q. Do you decline to give any other names there?

A. Other than the chief of police and my own observations, yes, sir.

Q. Now all you saw there when you came in was this jar upon the bar?

A. That's all. It was handed to me by Mr. Marler, and he gave me these glasses, and I retained those in my possession until I turned them over to him at Wallace.

Q. You didn't see where the jar came from?

A. I didn't see where he got it, no, sir.

MR. NORRIS: That is all.

RE-DIRECT EXAMINATION

BY MR. AILSHIE:

Q. You say you were in this place the day prior to that?

A. Yes, sir.

Q. Was Mr. Rantala in there that day?

A. Yes, sir.

Q. Did you have any conversation with him?

A. Not a word.

Q. What was Mr. Rantala doing at that time?

A. When I went into Mr. Rantala's place he was standing right near, behind, at the end of the bar, and he walked out around the bar, and the tables were back, and I was standing looking at the men at the tables, and Mr. Rantala walked out and near

me to a sink on the right hand side of the building as you go in, near the door, and he walked in and picked up a jar about the size of that, and poured it into the sink and put water into it, and took a drink, and put the jar down, and walked back behind the bar, and nothing was said, and I didn't speak to anyone.

Q. Did you detect any odor from that?

A. I could smell whiskey from some source, yes, moonshine.

MR. AILSHIE: That is all.

RE-CROSS EXAMINATION

BY MR. NORRIS:

Q. You say you are connected with the Law Enforcement Department of the State of Idaho?

A. Yes, sir.

Q. Is your salary paid by the State, or are you appointed by the—

A. My salary is paid by the State.

Q. Now you say you saw Rantala go over and pick up a jar. Was there anything in it?

A. There was liquid in it, yes, sir.

Q. And you say it had the odor of moonshine?

A. I detected the odor of moonshine. I don't know where the moonshine was.

Q. And you stood there and let him empty that out, and never arrested him?

A. When he picked it up and turned it up the stuff was gone.

Q. You saw it before—

A. I didn't know he was going over there, and I didn't know what his purpose was in going over. I never detected anything out of the usual until he picked the jar up and dumped it out.

Q. What kind of a sink was this?

A. There is no bar or anything there; it is just a square—it is just a tin sink there, and a hydrant, that I noticed.

THE COURT: You mean a faucet?

A. Yes, a faucet.

Q. And you made no effort to obtain any moonshine?

THE COURT: He has answered that.

Q. Or samples of it?

A. I didn't make any effort there, no.

Q. You didn't arrest him at that time?

A. I hadn't either a search warrant or a substantiating witness. I wasn't looking for him at the time. I was looking for another party.

Q. How close were you to this sink?

A. Oh, I was probably eight or nine feet, something like that, six feet, probably, from Mr. Rantala, when this was poured out.

Q. Were you that close when he picked the jar up?

A. Just about. I was standing looking at the

tables, and he walked past me, and when he got to the sink I was probably that close.

Q. You made no effort to grab the jar?

THE COURT: He has answered that.

MR. AILSHIE: That is repetition.

WITNESS: I said no.

Q. What day was that, you say?

A. It was along the fore part of May, around the first week in May.

THE COURT: Relative to the day you got this jar, what day was it?

A. It was the day before we got the jar.

Q. Was anybody else there at that time?

A. In the building?

Q. Yes.

A. Yes, there was some eight or nine in the building the first day I was there.

Q. Did you know any of them?

A. I know some of the men to see them, as I know a mining camp. I don't recall their names. I know them when I see their faces; I don't know their names.

Q. Was Hoiska in there?

A. I don't recall whether he was or not, that day. If he was I didn't see him. I don't recall him. I wouldn't swear positively whether he was or I wouldn't swear that he wasn't. Mr. Rantala was running the bar.

MR. NORRIS: That is all.

MR. AILSHIE: That is all.

(WITNESS EXCUSED.)

PAUL REYNOLDS, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. AILSHIE:

Q. State your name and place of residence.

A. Paul Reynolds. I live at Wallace, Idaho.

Q. You are a Federal Prohibition Agent, are you?

A. I am.

Q. Where are you stationed now?

A. Wallace, Idaho.

Q. Mr. Reynolds, did you conduct a search of the Rantala-Hoiska place at Mullan?

A. I did.

Q. The first of March this year?

THE COURT: The first of May, you mean.

A. The 7th of May.

Q. Who was present at the time?

A. Agent Marler and Mr. Foster, J. D. Foster, of Wallace.

Q. Just describe this place, will you, what business was carried on there.

A. It is a cigar and soft drink place, and has

a card table or two, and a pool table, in it.

Q. Who was in the place when you and agent Marler first went in?

A. Mr. Rantala was in there behind the bar as we walked in.

Q. Was there anyone else?

A. Yes, there were several men in there.

Q. Several others?

A. Yes, several other men, eight or nine men, I suppose. I walked right back to the sink, which is about half way to the rear of the building from the front, and stood there, and just as I turned around I saw agent Marler set a jar up on the counter, and Mr. Foster walked over, and Frank asked him to take care of the jar.

Q. You mean Frank Marler?

A. Yes, Frank Marler, Agent Marler. And then I went back to the rear of the building and began searching that part.

Q. I will ask you to examine the jar here and state if that is the jar which you saw at that time?

A. Yes, that is the jar that Mr. Foster had.

Q. At that time, when you first saw Agent Marler set it up on the bar, did you examine it?

A. Not just then. I went to the rear of the building, and then came back.

Q. During the time you were in the premises did you examine it?

A. Yes, I smelled of it.

Q. Are you able to state what it contained at that time?

A. A very strong smell of moonshine whiskey.

Q. Mr. Reynolds, do you know whose custody that has been in since that time?

A. Mr. Foster brought it to Wallace and turned it over to Agent Marler and myself at the Commissioner's office, and we brought it to Coeur d'Alene and left it in the custody of Sheriff Quarles over night, and I took it to Spokane the next day and delivered it to the city chemist, Mr. Johnson, at Spokane, about two o'clock, and I got it at four o'clock, and brought it back to Coeur d'Alene, and it has been in the custody of Sheriff Quarles until this morning.

Q. Mr. Reynolds, was that, at the time you delivered it to Mr. Johnson, the chemist, in substantially the same condition as when you first saw it in the Rantala place at Wallace?

A. With the exception of the labels and the top.

Q. Was the contents in substantially the same condition?

A. Yes.

Q. Where is Mr. Johnson, if you know?

A. He is out of the city, out of Spokane, and couldn't be gotten.

Q. In reference to these glasses, I wish you would state where you have seen them before.

A. Those were in a sink at Mr. Rantala's and Mr. Hoiska's place. They were sitting in the sink

which was about half way to the rear of the building and on the opposite side from the sink that that jar was in. They were sitting by themselves.

Q. Did you find the glasses yourself?

A. Yes, sir.

Q. I wish you would examine this (jar) now as carefully as you can, both the color and the smell, and state whether or not that is in—

A. That smells of moonshine, yes, sir.

Q. What is its condition now with reference to —as nearly as you are able to state—when you first found it at the Rantala place?

A. It smells about the same.

Q. It smells about the same.

Q. And from its appearance does it look the same?

A. Yes, it looks the same.

MR. AILSHIE: I offer this in evidence at this time, Your Honor. I think the witness has stated—

MR. NORRIS: I would like to cross examine first.

THE COURT: Are you through with the witness?

MR. AILSHIE: Yes, sir.

CROSS EXAMINATION

BY MR. NORRIS:

Q. Mr. Reynolds, you say you took this over to Spokane?

A. Yes.

Q. And delivered it to the city chemist there?

A. I did, the next day.

Q. And did you leave it in his office and go away?

A. Yes, sir.

Q. How long was it in there?

A. From two o'clock to four. I know I got it at four o'clock, and I think it was about two that I left it there. He was a little late getting back from dinner.

Q. And were any of you Government men in there during the time he had that?

A. Only when I delivered it and when I came and got it.

Q. You people went up there and delivered it to that chemist, and then you went away, all of you?

A. Well, I was the only one there, and I went away, yes.

Q. Then you went back about two hours later?

A. Back, and got it at four o'clock.

Q. Then you didn't see that jar from the time it was delivered to the chemist until you went back?

A. No.

Q. Those glasses there, they are the ordinary glasses, aren't they?

A. They are a little smaller glasses than—

THE COURT—They show for themselves.

MR. NORRIS: We at this time, Your Honor, object to the introduction—

THE COURT: Have you finished your cross examination?

MR. NORRIS: I think I am through, if Your Honor please.

THE COURT: The objection is overruled.

MR. NORRIS: I would like to state the objection.

THE COURT: Very well.

MR. NORRIS: We object, upon the ground that the jar was in the hands of the sheriff of Kootenai County, at least over night, I believe, and later in the hands of the city chemist at Spokane for two hours, and out of the possession of the Government officers, and that there has no showing been made that the contents were not changed or tampered with in any way during the time that it was in the possession of the chemist and the sheriff of this county.

THE COURT: Overruled.

MR. NORRIS: That is all.

(WITNESS EXCUSED.)

MR. AILSHIE: I will withdraw my offer of the exhibit until one further witness has been called.

THE COURT: Well, the exhibit is in, but you may strengthen the matter, if you desire. I am letting it go in because the witness states that it smells and looks substantially the same now as it did when he got it in Mullan. And anyway it isn't very important. The question is what it was when it was there, and the witnesses have testified to that.

MR. AILSHIE: Under the Court's statement the Government will rest.

THE COURT: Well, you might, if Mr. Quarles is here, put him on.

T. L. QUARLES, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. AILSHIE:

Q. State your name and residence.

A. T. L. Quarles, Coeur d'Alene, Idaho.

Q. And you are the sheriff of Kootenai County?

A. Yes.

Q. Mr. Quarles, I will ask you to examine this jug or jar and ask you to state if that was delivered to you, has ever been delivered to you by Agent Reynolds?

A. Yes, that was, that jug with others, several others, they delivered to me, packed in a box with paper around them; I think there were six or seven altogether, and that was one of them.

Q. Do you remember about the date?

A. No, I don't recall the date. I didn't make a note of it at the time, but it was some little time ago, two or three weeks ago, or a month.

Q. How was that kept by you?

A. Well, they come and got that the next morning, and they took it to Spokane, and brought it back that night, and put it in the box where it was, and I kept it locked up in the liquor room, and it has been in the liquor room packed in that box until this morning, when I delivered it to one of the federal men.

Q. Mr. Quarles, was that delivered by you to them on the morning to which you refer, in substantially the same condition as when it was delivered to you the evening before?

A. That was delivered by me to Mr. Hesser this morning in exactly the same condition that I received it.

Q. As I understand, it was taken out of your vault twice?

A. Yes, this morning and the morning after it was brought from Wallace.

Q. And it is now in substantially the same condition, you state, as when it was first delivered to you?

A. So far as I know it has never been touched during that time.

MR. AILSHIE: You may inquire.

CROSS EXAMINATION

BY MR. NORRIS:

Q. Did you take that property in possession yourself and put it in the vault, Mr. Quarles, or some deputy?

A. I put it in the vault. They carried it into my little private office, and I unlocked the vault and set the box in, containing all of this stuff.

Q. Anybody else have access to that vault?

A. Nobody at all.

Q. None of the deputies?

A. None of the deputies.

MR. NORRIS: That is all.

MR. AILSHIE: That is all.

(WITNESS EXCUSED.)

GEORGE R. HESSER, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. AILSHIE:

Q. State your name.

A. George R. Hesser.

Q. You are a Federal Prohibition Agent?

A. Yes, sir.

Q. Mr. Hesser, calling your attention to this quart jar here, did you bring that to the court room this morning?

A. Yes, sir.

Q. Where did you get that?

A. I got it from Mr. Quarles' office, Sheriff Quarles' office.

Q. And you delivered it to Mr. Reynolds this morning?

A. To Mr. Reynolds this morning, in the United States Marshal's office.

Q. You delivered it to him in substantially the same condition as when you received it?

A. Yes, sir.

MR. AILSHIE: You may inquire.

CROSS EXAMINATION

BY MR. NORRIS:

Q. Do you know, Mr. Hesser, why this jar was placed up at Mr. Quarles' office, or vault, rather—

THE COURT: That isn't cross examination.

MR. NORRIS: Well, I will make him my own witness for that.

THE COURT: No.

MR. NORRIS: Not at this time, I suppose. That is all.

MR. AILSHIE: The Government rests, Your Honor.

THE COURT: If you desire, this top of the jar may be taken off, and the jurors who desire may smell of it.

(Mr. Ailshie removed top from jar and passed jar to jury.)

THE COURT: Proceed, Mr. Norris. Let us get along.

MR. NORRIS: I will make a little statement before placing our evidence on.

May it please the Court, Gentlemen of the Jury, there are two informations, as have been explained to you, one charging Rantala with possession of this moonshine, and another charging him with maintaining this building and place as a nuisance, the Government charges. Then there is a second information,—we are trying the two casese together,—charging Andy Hoiska with the possession of whiskey here, moonshine, the exact amount unknown, and also charging him with maintaining this place as a nuisance.

Now the evidence we will introduce will show, I think, that this man Rantala had nothing to do with the running or management of this place. Whatever occurred in there, and whatever responsibility there might be on account of it, rests solely with this man Hoiska. And it will also show you that that declaration was made to the officers there, and that he requested them to give him a portion of this liquid there for testing and examination. We will show you by the receipts, the lease, the receipts for license, lease, etc., and various papers,

that the place was run solely by this man Andy Hoiska, and that the defendant Rantala is in no way responsible for whatever occurred in that building, as to its maintenance as a nuisance or otherwise, or as to its control and management.

Call Mr. Rantala.

JOHN RANTALA, produced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NORRIS:

Q. Mr. Rantala, you may state your name to the court and jury.

A. John Rantala.

Q. Are you the defendant in this action?

A. Yes.

Q. Are you one of them?

A. One of them, yes.

Q. Now, Mr. Rantala, this place of business that has been spoken of there, do you own that property?

A. I own that building, yes.

Q. You may state whether or not, on the 7th day of May, you were running any business in that building yourself.

A. No, sir, I did not.

Q. Who, if anybody, was running this business there?

A. Antti Hoiska was running this business.

Q. Now, Mr. Rantala, how do they spell Andy in Finnish?

A. A-n-t-t-i.

Q. Was there any written lease or contract between you and this man Hoiska at the time this place was raided on the 7th day of May?

A. Yes, sir.

A certain paper was marked Defendant's Exhibit No. 1.

Q. You may examine the paper handed you, marked Defendant's Exhibit 1, and state to the court and jury what that is, in a general way.

THE COURT: Is that the paper between you?

A. That is the lease paper between me and Antti.

THE COURT: Very well.

Q. Now this description in this lease, being part of the building shown as No. 40 of Block No. 31 of Sheet No. 4, as per Sanborn's fire map of Mullan, is that the description of this building that was raided?

A. That is the description.

THE COURT: Go right on, Mr. Norris. I will permit this to go in if there is no objection, and hear the objection, if there is one, later on.

Q. Were you in there, Mr. Rantala, on the day of this raid, the day the officers came in there, were you in the building?

A. Yes, I was.

Q. What were you doing in there at that time?

A. At that time I was behind the bar laying my elbows on the bar, looking in the paper, the newspaper on the bar.

Q. Had you gone in there that morning for any purpose?

A. I was doing carpenter work in there all day, in the back end of the building; I made a door in the back end of the building in the pool room, the pool room and store room.

Q. Where do you keep your tools?

A. And then I was coming from that just about a couple or three minutes before these officers come in, and took my tools back of the bar. I got a place in there under that show window back under the bar where I always keep my tools.

Q. You say you had just come in with your tools and put them under there?

A. Yes.

Q. Then what did you do?

A. I just come so there, and I see the newspaper on the bar, and I started to read that paper, look at the paper, just while those fellows came in at the same time.

Q. You heard the statement of this man who

testified here that he saw you knock a jar into the sink there. Is this correct?

A. No, sir. I never had a move before he lift that jar on the bar.

Q. He further stated that you made an effort to push it into the water, I believe, or get away from it, or something of that nature. Did that occur?

A. What?

Q. He made a further statement that you made an effort to push the jar into the water or get it away from him. Is that correct?

A. No, I never make a move before he got that jar on the bar. It was about half full, about half full at that time, and then he asked my name, and that is the first time I am close by it, and he put a paper on the bar.

Q. When you went around behind the bar and put your tools away and turned around to read this paper, did you notice a jar sitting on this drainboard?

A. No; I never look down below.

Q. Is there a drainboard there, Mr. Rantala?

A. Yes, there is a drainboard on both sides.

Q. Is it steep, slanting, or—

A. It is slanting pretty steep, something like that (indicating), both sides the same.

Q. There is a drain board like this?

A. Yes.

Q. Coming into each side of the sink?

A. Yes.

Q. On each end of it?

A. Yes.

Q. What was said between you and the officers at that time, if anything, in regard to who was running the place there?

A. Well, he was asking what is my name, and I told him my name, and then he said he is a federal officer, and he throwed some kind of a paper folded up on the bar.

Q. Was anything said about you running the place there?

A. I told him I aint got nothing to do with this place, and Antti come and said he run the place.

Q. You say Antti told him at that time that he ran the place?

A. Yes.

Q. This man sitting here?

A. Yes, that is the fellow. He say he is the boss of the place.

Q. You may state whether or not anything was said by this man Hoiska as to having them give him a little part of this liquid that was in that jar, for analysis?

A. Yes, Antti told them fellows, "Don't take it all; let me have some of it and I will have it tested."

Q. Did they refuse that request?

A. They refused that request.

Q. How long has Mr. Hoiska been running this place?

MR. AILSHIE: I object, if Your Honor please. The lease shows for itself.

THE COURT: He may state how long as a matter of fact.

A. Well, he has been running the place since the first of December, 1923, he run the place.

Q. And then you re-leased it to him then on the first day of May, according to that lease?

A. Yes, sir.

MR. NORRIS: Isn't that date the first day of May?

MR. AILSHIE: Yes. If that has been offered, I have no objection.

THE COURT: Very well. It will be considered in evidence then.

Q. Who was present, Mr. Rantala, in that place there at the time of this raid, except yourself and Mr. Hoiska?

A. There was several people in there, about twelve or fifteen people was in there.

Q. Can you mention the names of some of them?

A. I can mention some of them. There was Webb Leisure, was one, I believe.

Q. Can you mention any other?

A. Yes. And there was Eli Nimi, was there.

Q. And anybody else?

A. Arthur Hablea.

Q. Anybody else that you remember?

A. Antti Hoiska was there.

Q. But outside of you two.

A. Well, there was quite a few.

Q. Was there a painter in there that day?

A. I don't remember—Frank Hon was there, but I don't know just whether it was that time or not. And there was Charlie Hill was in. And Oscar Strun was in.

Q. You may state to the court and jury whether or not you took any part in running that place, or its management, in any way?

A. No, sir, not since last fall.

MR. NORRIS: That is all, I believe. Take the witness.

CROSS EXAMINATION

BY MR. AILSHIE:

Q. Mr. Rantala, when Agent Marler came in you were behind the bar?

A. Yes, sir.

Q. And in his effort to get to this jar he had to shove you aside, didn't he?

A. No, sir.

Q. He didn't pass you?

A. No. I was on the other end of the bar, close to the show case, almost to the end of the bar.

Q. You had never seen this jar before?

A. No, I don't see it.

Q. How often did you go in there?

A. Which?

Q. Into this pool room?

A. I have been working there for the past month, I do lots of work. I have been doing lots of work in there. I been in there almost every day.

Q. You used to sell cigars from behind the counter there, didn't you?

A. No, sir, I never sell nothing in there.

Q. You didn't ever sell anything?

A. No, sir.

Q. Didn't you sell some while the agents were there?

A. No, sir, I never sell any.

Q. The day prior to this you were in there?

A. Yes, I was doing work at that time too.

Q. You saw Mr. Foster there?

A. I didn't see Foster at all. I see Foster go out, but I don't see him when he go in.

Q. You saw him when he went out?

A. Yes.

Q. But you went over there and dumped out a jar that day?

A. I might have; I don't remember; I might have, because I take a drink once in a while every day, many times.

Q. And you dumped out a jar and then took a drink?

A. I don't remember; I might have. I do that many times a day.

Q. But you don't remember that you didn't turn that bottle into the sink?

A. Of course; I remember I didn't.

Q. You remember this one, that you didn't?

A. I didn't.

Q. Didn't you also reach and pull this plug out of the sink?

A. No, sir; I didn't see it before he got this jar on the bar.

Q. When did you first see that jar?

A. That is the time when Mr. Marler put that on the bar.

Q. Just as he put it on the bar?

A. Yes.

Q. And you were standing near by him?

A. I was reading the paper. Somebody was coming in there and going to take a drink, I thought.

Q. You were standing right close to him?

A. About two and a half or three feet from the sink.

Q. And he pushed you over to where you were?

A. No, sir, he never touched me.

Q. Did you see him reach in and get this bottle?

A. I don't look at it.

MR. NORRIS: Jar, you mean.

Q. Did you see him reach down and get the jar?

A. No; I just see him put that on the bar.

Q. Where was Hoiska at that time?

A. He was playing cards on the table a little—

Q. He was quite a ways away?

A. I don't know. He was about seven feet from the end of the bar, seven or eight feet.

Q. And you were the closest one to Agent Marler at the time you first saw this bottle?

A. I was the closest one, yes. I was reading the paper.

Q. There was no one else behind the bar?

A. No, sir, except Marler, no other.

Q. Didn't you ask, at the time of the Commissioner's hearing didn't you ask the officers to give you the plug?

A. Antti want that because he says he hasn't got no plug to fit that hole.

Q. Didn't you ask?

A. Yes. Antti wanted me to tell about it.

MR. AILSHIE: That is all.

MR. NORRIS: This man Hoiska don't read English very well, or understand, and I will ask to introduce these papers with this witness. They really should come with the other, but his lack of English is going to make it hard. I will ask you to mark all of these papers.

MR. AILSHIE: Perhaps if I may examine them you can dispense with some of it.

MR. NORRIS: Well, you may look at them. There is no secret about it.

Certain papers were marked Defendant's Exhibits 2 to 8, inclusive.

MR. AILSHIE: I will waive the identification.

MR. NORRIS: It will not be necessary. The District Attorney is willing to waive the identification of these papers.

THE COURT: You may step down.

MR. NORRIS: That is all, I believe.

(WITNESS EXCUSED.)

WEBB LEISURE, produced as a witness on behalf of defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NORRIS:

Q. Mr. Leisure, you may state your name to the court, please.

A. Full name?

Q. Yes.

A. D. W. Leisure.

Q. And where do you live?

A. Mullan, Idaho.

Q. Were you in this building at Mullan at the time of this raid?

A. Yes, sir.

Q. Did you see Mr. Rantala there that day?

A. Yes, sir.

Q. Did you see that man, the prohibition officer, set a jar up on the counter there?

A. I did.

Q. Were you in a position where you could see Mr. Rantala there?

A. I was.

Q. Did you see him go around behind the counter?

A. Yes, sir.

Q. Do you know for what purpose he went there?

MR. AILSHIE: I submit that is not a proper question.

THE COURT: Sustained.

Q. Did he have anything with him when he went around there?

A. He did.

Q. What was it?

A. He had a hammer and square and saw.

Q. What did he do with them. Did you notice where he put them?

A. He poked them into a little hole under the show platform that comes in from the window.

Q. Then what did he do?

A. He turned around to the show case and picked up a paper.

Q. Were you in a position where you could see his movements at that time?

A. Yes, I was within about six feet of him, right facing him.

Q. Were you facing him at the time the officers came in the house there?

A. I was.

Q. Did you see him knock any jar over there, or put anything in the sink?

THE COURT: Were you in a position—Could you see behind the bar?

MR. NORRIS: I will withdraw that question for a moment.

Q. Were you at that time in a position where you could see his arms and shoulders?

A. I was.

Q. You may state whether or not you saw any movement of his arms or shoulders there such as would be made in knocking a jar into a sink?

MR. AILSHIE: I object to that question, if Your Honor please.

THE COURT: Sustained.

Q. Well, I will ask you this question. If Rantala at the time this man came in to the end of the counter there had knocked a jar into the sink there, would you be able to have seen it from where you were?

MR. AILSHIE: I object to that, if Your Honor please.

THE COURT: Sustained.

Q. Well, did you see Mr. Rantala make any movement with his hands there?

A. Not otherwise than to handle the paper on the show case.

Q. If he had made a movement with his hands such as knocking a jar into the sink, could you have observed it or seen it from where you were?

Mr. AILSHIE: I object to that, if Your Honor please.

THE COURT: Sustained.

Q. Did you see him make any movement with his hands?

A. No, sir.

MR. AILSHIE: That is repetition, I believe.

Q. Were his hands in your view up until this jar was set up on that counter?

A. Yes, sir.

Q. Did he at any time knock the jar into the sink?

MR. AILSHIE: I object to that, if Your Honor please.

THE COURT: Sustained. Do you know who runs and operates this place?

A. Well, I couldn't say positively, no.

Q. Did you ever see Mr. Rantala there running the place?

A. No, sir.

Q. That is, prior to the 7th day of May.

A. No, sir.

Q. Are you in there frequently?

A. Yes, sometimes quite often.

Q. When you were there who was in charge of the place, who was doing the—

MR. AILSHIE: I think that is immaterial, if Your Honor please—in charge of the place, would not have any particular bearing. The question is, who had possession of this intoxicating liquor, if there was intoxicating liquor there.

MR. NORRIS: It would have a bearing on who was maintaining a nuisance there I presume.

THE COURT: He may answer. Read the question.

(Question read.)

THE COURT: I shall sustain the objection as to who was in charge of the place. You may ask him who was doing the work around there.

MR. NORRIS: That is what I am trying to get at.

Q. Who was doing the work there attending to the business when you were—

A. Hoiska.

Q. At all times when you were in there?

A. Yes, sir.

MR. NORRIS: I believe that is all.

CROSS EXAMINATION

BY MR. AILSHIE:

Q. Mr. Rantala was the only one behind the bar, though, at the time the agents came in?

A. Yes, sir.

Q. As a matter of fact, Mr. Leisure, you weren't there at that time, and you came, and just came to the doorway of the place as the officers started out?

A. No, sir.

Q. And Mr. Foster passed you at that time?

A. He did not. I was sitting right down across on a bench near across from the show case.

MR. AILSHIE: That is all.

BY THE COURT:

Q. You were sitting in front of the bar?

A. I was square in front of the bar, yes, sir.

Q. What were you doing?

A. I was coming in and sitting down and talking to some of the boys that were coming off shift.

Q. You were talking to the boys at the time this occurred?

A. Yes, sir.

Q. And had been talking?

A. Yes, sir.

THE COURT: That is all.

BY MR. AILSHIE:

Q. What is your business?

A. I am a prospector.

Q. Where do you live?

A. Mullan.

Q. How long have you lived there?

A. Thirty-eight years.

Q. How long have you known John Rantala and Antti Hoiska.

A. I have known Rantala about seventeen years. I have known the other gentleman about five or six years.

Q. Have you ever been associated in business with Rantala?

A. No, sir.

Q. Weren't you and Mr. Rantala in business or operating together for a time?

A. No, sir.

Q. You were not?

A. Not at all, ever.

MR. AILSHIE: I think that will be all.

THE COURT: Call your next witness.

(WITNESS EXCUSED.)

ELI NIMI, produced as a witness on behalf of defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NORRIS:

Q. Mr. Nimi, you may state your name to the court.

A. Eli Nimi.

Q. Where do you reside? Where do you live?

A. Mullan, Idaho.

Q. Do you know this place that was raided up there, now in controversy?

A. Yes.

Q. Do you know John Rantala and this man Hoiska?

A. Yes, sir.

Q. Were you in that place at the time this raid was made?

A. Yes, sir.

Q. Did you see John Rantala there?

A. Yes, sir.

Q. What did you see him do there?

A. I saw he went behind the bar with some carpenter tools.

Q. After that what did he do?

A. He left them behind the show window, and then went against the bar and read some newspapers there.

Q. What was he doing then afterwards?

A. I don't see what—I did'nt see him do anything else.

Q. What position was he in when he was

against this bar, after he put these tools away, leaning against the bar?

A. Yes.

Q. Where were his hands and arms?

A. His arms were on top of the bar.

Q. Was he in that position when the officers came in?

A. Yes, sir.

Q. You may state whether or not you were in a position to see—

THE COURT: No. You may ask him where he was and what he was doing.

Q. Where were you and what were you doing?

A. I was sitting down about ten feet from the rear end of the bar.

Q. Ten feet from the end of the bar?

A. Yes.

THE COURT: The rear end of the bar. And what were you doing?

Q. What were you doing?

A. Me?

Q. Yes?

A. I was sitting down on a chair.

THE COURT: Doing what?

Q. Were you doing anything besides sitting there?

A. No.

THE COURT: Were you talking with the boys?

A. No, I wasn't.

THE COURT: You were just sitting there?

A. Yes.

Q. Could you see John Rantala's hands or arms from where you were?

A. Yes, sir.

Q. Did you see him make any move with his hands or arms or anything of that nature?

A. I didn't see anything.

Q. Did he knock anything into a sink there, or do anything of that nature?

MR. AILSHIE: I object if Your Honor please.

THE COURT: Sustained.

Q. Did you see any of these officers push him or him push them, or anything of that nature?

A. I didn't see it, because that fellow, when he went in I saw only his back, that is all.

THE COURT: The officer's back, I suppose you mean.

A. Yes.

Q. Did you see Rantala push him or him push Rantala?

A. I didn't see him.

Q. Do you know who run and operated that place there before May 7th?

A. I don't know; I am not sure.

Q. Were you in there very often?

A. Yes, I was, very often, there.

Q. And who was doing the business there, doing the work around there, when you was there, selling the goods, and stuff like that.

A. I see Antti Hoiska and one other fellow named Jack—I don't know his last name.

Q. Named who?

A. Jack.

Q. Do you know who had him employed? Do you know who this other fellow was working for?

A. Yes, I know his first name was Jack.

Q. Who was he working for? Was he working for Rantala or Hoiska, or do you know?

A. He worked at that place. He didn't name either one.

Q. You don't know?

A. No.

MR. NORRIS: That is all.

CROSS EXAMINATION

BY MR. AILSHIE:

Q. Now when Mr. Marler came in he was between you and Rantala, so that you couldn't see Rantala?

A. Yes, when he went behind the bar.

Q. When he went behind the bar he was between you and Rantala, and so you couldn't see anything that went on there?

A. Not very plain.

Q. Did you see Mr. Leisure that day there?

THE COURT: The old man that just testified here, did you see him?

A. Yes, I saw him.

Q. Where was he sitting, with reference to you?

A. He was on the bench.

MR. NORRIS: I don't don't think that is proper cross examination.

THE COURT: Overruled.

Q. He was where?

A. He was sitting on the bench.

Q. On the what?

A. Bench.

Q. Where is that, with reference to the bar?

A. That is about six or seven feet across the pool hall, the right hand side when you go in.

Q. As I undersand, you were sitting at the end of the bar?

A. Yes.

Q. And then he was sitting off facing the bar?

A. Yes, sir.

Q. Was that it?

A. Yes.

Q. What were you doing there at that time?

A. Doing nothing, just sitting down.

Q. When had you come in?

A. I just came from the work about half an hour before that.

Q. And had you come down from the mine?

A. Yes.

Q. And the officers came down with the miners, didn't they?

A. Yes, a little later.

Q. A little later you saw them come in?

A. Yes, sir.

Q. And you saw them hand up this jar there?

A. I saw one of the officers put that on top of the bar.

Q. And at that time Mr. Rantala was the only one that was behind the bar, wasn't he?

A. Yes, sir.

Q. He was the only one?

A. Yes, sir.

Q. How long have you lived up there?

A. At Mullan?

Q. Yes.

A. About eight months this time.

Q. Do you know Mr. Rantala and Hoiska pretty well? You have been around there a good deal?

A. I don't know just what you mean.

Q. Have you been around their place a good deal?

THE COURT: Have you been in this place many times?

A. Yes, I live next door from that place.

Q. Are they from the same country that you are?

A. Yes, sir.

MR. AILSHIE: That is all.

BY THE COURT:

Q. Did you see the officers when they came in the door?

A. Yes, sir.

Q. The door was open, was it?

A. Yes.

Q. And you were looking at them as they came in?

A. Yes. My face was towards the door.

Q. And you saw Mr. Marler and Mr. Reynolds come in the door?

A. Yes.

Q. And you watched them as they came in?

A. Yes, I saw them.

THE COURT: That is all.

ARTHUR HABELA, produced as a witness on behalf of defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NORRIS:

Q. State your name, Mr. Habela.

A. Arthur Habela.

Q. Where do you reside?

A. At the Midnight mine, about a mile and three quarters from Mullan.

Q. You are acquainted with this pool hall that was raided down there?

A. Yes.

Q. At Mullan?

A. Yes, I was in there then.

Q. Were you there when the officers came in?

A. I was.

Q. And who was there?

A. Besides me?

Q. Yes.

A. Oh, I guess there was, oh, all the way from twelve to fifteen in there, I guess.

Q. Was Mr. Rantala there?

A. Yes, sir.

Q. Mr. Hoiska?

A. Yes.

Q. At the time the officers came in there did you note where Mr. Rantala was?

A. Yes.

Q. Where was Mr. Rantala at that time?

A. He was back of the bar right by the show case.

Q. Did you see him go in there?

A. I did.

Q. What did he do when he went in there. Did he have anything with him?

A. Yes.

Q. What was it?

A. Well, he had a saw and a square, I think, and a hammer.

Q. Then what did he do after he went back behind the bar?

A. Well, he put them under that—there is a kind of a—well, it is in a show case under the window, a kind of a place there, he reached down there and put them down there somewhere.

Q. Then what did he do?

A. I think he picked up a paper off of the show case and stood right at the end of the bar there and started to read it.

Q. At the time the officers came in there could you see Mr. Rantala's hands and part of his body at that time?

A. Yes.

Q. Where were you sitting with reference to the bar?

A. I was standing in front of the window in front of the show case, about three feet back from it, or so, by the door.

THE COURT: You mean by the front door where the officers came in?

A. By the front door.

Q. And did you see this man, this officer, go around behind the counter there?

A. When he come right in he just went to the end of the bar and reached down and at the same

time I guess he laid a paper there of some kind on the bar there. I don't know what he said; I didn't hear or pay any attention to it.

Q. At that time what were you doing—just standing there?

A. Just standing there at the front.

Q. Were you where you could see Mr. Rantala?

A. Yes, I was just across from him, oh, not—

Q. Did you see him make any movement there with his arms?

A. No. He was standing at the end of the bar reading the paper.

Q. Did you see any movement between him and this man that went around behind the bar, like shoving each other, or anything of that kind?

A. No, I didn't.

Q. From your position there could you have seen that had it occurred?

MR. AILSHIE: I object to that, if Your Honor please.

THE COURT: Sustained.

Q. Were you in view of Mr. Rantala during all the time until the jar was set up on the bar there?

MR. AILSHIE: That is repetition.

THE COURT: Sustained.

Q. You say you have been to this place a number of times. Is that true before May 7th.

A. Yes, I have been there, oh, maybe every week or every two weeks, probably every month.

Q. Who transacted the business there, who had charge of the goods?

A. I understood Hoiska did.

MR. AILSHIE: I object to what he understood, if Your Honor please.

Q. Who did you see taking charge there and doing the business?

A. Why, I see Antti Hoiska.

MR. NORRIS: You may take the witness.

CROSS EXAMINATION

BY MR. AILSHIE:

Q. Did you see Mr. Rantala around there very frequently?

A. Why, yes, probably every time I was in there.

Q. How often were you in there?

A. Oh, maybe I would be in there once a week, and maybe every two weeks, whenever I happened to come down from the mine.

Q. You saw him practically every time you were up there?

A. Practically every time, yes.

Q. At the time the officers came in Mr. Rantala was the only one behind the bar?

A. Yes.

MR. AILSHIE: That is all.

THE COURT: That is all.

MR. NORRIS: That is all.

(WITNESS EXCUSED.)

FRANK HORN, produced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NORRIS:

Q. State your name to the court and jury, Mr. Horn.

A. Frank Horn.

Q. Where do you reside?

A. Mullan.

Q. How long have you been up there?

A. Twelve years.

Q. Do you know Rantala and Hoiska here, the defendants?

A. Yes, sir.

Q. Have you ever been in their place or pool hall?

A. Yes, sir.

Q. That was raided up there on the 7th day of May this year?

A. Yes, sir.

Q. Have you been about that place frequently of otherwise, prior to May 7th?

A. The last month I have, yes.

Q. When you were there who was conducting the business?

A. Hoiska.

Q. Now do you know whether or not there were repairs being made on that building just before May 7th, and along about that time?

A. Yes, sir.

Q. Did you do any work there yourself?

A. Yes, sir.

Q. Do you know whether Mr. Rantala did any work there himself along about that time and prior to the 7th day of May?

A. Yes, sir.

Q. What was he doing there?

A. Carpenter work.

MR. NORRIS: Take the witness.

CROSS EXAMINATION

BY MR. AILSHIE:

Q. You say when you were there Mr. Hoiska was conducting, that is, making sales and so on?

A. Yes, sir.

Q. Did you ever buy anything there?

A. Yes.

Q. What?

A. Tobacco.

Q. Who did you buy that from?

A. Hoiska.

Q. Was there anyone else there that was making sales?

A. Yes, sir.

Q. Who?

A. I don't know this fellow's name, that is, he works off and on there.

Q. Did you ever buy anything from him?

A. No. I see him waiting on customers.

Q. You never bought anything from anyone but Mr. Hoiska?

A. Yes.

Q. Were you ever in there when others made purchases?

A. Yes, sir.

Q. Do you recall any particular purchases now?

A. No, I can't.

Q. Were you ever in there when any whiskey was bought?

A. No, sir.

MR. AILSHIE: That is all.

(WITNESS EXCUSED.)

JOHN RANTALA, heretofore duly sworn on behalf of defendants, upon being recalled, testified as follows:

DIRECT EXAMINATION

BY MR. NORRIS:

Q. I would like to ask this question of this witness on account of the other's infirmity. I believe you stated that Mr. Hoiska run that business there. Do you know whether he had a man prior to May 7th in there in his employ working one shift?

A. He has had one man working there.

Q. What was his name?

A. It was Jack Mackay.

Q. Where is he now?

A. He was in Mullan, I think, he was in Mullan anyhow when I left there about four days ago.

MR. NORRIS: That is all.

MR. AILSHIE: No cross examination.

THE COURT: That is all.

MR. NORRIS: That is all, except this man here, Your Honor. I don't know whether I will be able to examine him or not. He don't talk English very good. Shall I put him on the stand and let him attempt it, or shall we—

THE COURT: What do you want me to do?

MR. NORRIS: I may have to have an interpreter.

THE COURT: Well, have you an interpreter here?

MR. NORRIS: No, I haven't

THE COURT: Then what do you want me to do?

MR. NORRIS: I think we can get one, probably.

THE COURT: You ought to have an interpreter here if you need one.

MR. NORRIS: Well, we will get along the best we can. Take the stand, Mr. Hoiska.

THE COURT: If you will make your questions very short and direct, and omit qualifying words, he will probably be able to understand.

ANTTI HOISKA, produced as a witness on behalf of defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NORRIS:

Q. State your name.

A. Antti Hoiska.

Q. Can you tell us how to spell that in Finnish?

THE COURT: We are not interested in that.

MR. NORRIS: I want to show that it is the same man. Part of these papers are Antti and part Andy.

THE COURT: That has already been explained. I suppose that will be admitted.

MR. AILSHIE: We have waived the identifcation of these matters.

Q. Tell me where you live.

A. I live at Mullan.

Q. Do you run any business there?

A. Yes.

Q. This place that the officers came to, do you run that place?

THE COURT: What is your business? What business do you have?

A. Pool hall and soft drinks.

THE COURT: That is where the officers came?

Q. These officers here, is that your place that they came to, when they raided it? Do you know what "raided" means?

THE COURT: These men here. Do you see them. They came to your place?

A. Yes.

Q. Rantala, does he have anything to do with that place?

A. No.

Q. You have it leased? Do you know what "leased" means? Do you have it rented?

A. Yes, I lease that.

Q. Did you have it rented when the officers came there? When these men came there did you have it rented then?

A. Yes.

Q. Did Mr. Rantala have anything to do with it then?

A. No.

Q. Now this jar, do you know anything about that?

A. I know that bottle.

Q. Do you know whether Mr. Rantala has anything to do with that that day? Did Mr. Rantala put that bottle in there that day?

A. No, I don't think so. He ain't got nothing to do with that anyhow.

Q. Do you know who did put it in there?

A. I put it myself, but he was empty that time I put that back there behind the bar.

Q. Was Mr. Rantala there at the time when you put that back there?

A. No.

Q. What do you do in there, what business? Do you sell anything? Do you have any billiard tables?

A. Yes, I got pool tables there, and soft drinks, and cigars.

Q. Would you know the licenses if I should show them to you?

THE COURT: Counsel has offered to concede that.

MR. NORRIS: All right.

Q. How long have you run the place there, how long have you run it?

A. Why, I leased that place last Christmas.

Q. And you have been running it ever since Christmas?

THE COURT: You have run it since Christmas?

A. Yes.

Q. Did you have a man to work for you part of the time?

A. Yes, I have a man.

Q. Do you know his name?

A. Jack Mackay.

Q. Where were you when the officers came in? You know these men? Where were you when they came in?

A. I play the cards, I play the pinochle.

Q. Did you see them come in?

A. Yes, I see them.

Q. Did you get up?

A. Yes, I get up, I stand. He put the paper on the—

Q. I am not talking about that. Where were you?

A. I sit down at the card table.

Q. Did you get up when the officers came in?

A. Yes, after while I get up.

Q. Did you go over to where they were, where these men were?

A. Yes.

Q. Did you ask them any question about that?

A. What?

Q. Did you ask them anything about this jar or say anything about this jar?

A. I know I have that bottle behind the bar, but it was empty.

Q. Did you say anything to them about it? Did you ask them about giving you part of it, part of what was in it? Did you tell them to give you part of it?

A. Yes.

MR. AILSHIE: I think, if Your Honor please, it is not understanding the question; it is—

Q. Did you ask them to give you part of what was in it?

A. Yes, I ask him—he pick up the bottle and that bottle was more than half full, and I tell him if I have half of that water, anything what you got there, I like to test it before you take him out.

Q. Did they give you any of it?

A. No, sir.

Q. Did you tell them who was running the place there?

A. Yes, I tell him I own that place, I am the boss.

MR. NORRIS: That is all.

CROSS EXAMINATION

BY MR. AILSHIE:

Q. How long have you been in this country?

A. I come in 1907.

Q. In 1907?

A. Yes.

Q. You are able to talk English pretty fluently aren't you? You don't have any trouble talking English do you?

A. Well, I understand some.

Q. You have been here 14 years or more?

A. What?

Q. You have been here 17 years?

MR. NORRIS: That is argumentative, if Your Honor please.

A. Yes.

Q. You talked with the officers the day they came in there, and had no trouble talking with them, did you? The day these two officers came in there you talked with them? You talked with these officers the day they came into your place, didn't you?

A. Yes, I talked. I say I run that place, that is all, and I ask them for that bottle.

Q. How long have you been at Mullan?

A. Oh, a little over two years.

Q. How long have you known Rantala?

A. Well, a little over two years.

Q. A little over two years?

A. Yes.

Q. And when did you say you first started running this business?

A. The last of December.

Q. Didn't you hear Mr. Rantala tell Mr. Foster up there the day this raid was made that he had just sold out to you two days before? Didn't you hear him say that? Didn't you hear Rantala tell Mr. Foster that he, that is, Rantala, had just sold the place a few days before? Didn't you hear that?

A. I don't understand what you mean?

Q. You don't understand what I mean? Didn't you hear Mr. Rantala tell Mr. Foster,—you know know what I mean by that don't you?

A. Yes, I know.

Q. Didn't you hear him tell Mr. Foster that he had just sold the place a few days before the raid, before the officers came up there?

A. I don't—

Q. You don't have any trouble conducting your business up there, do you. You say you run the business up there?

A. Yes.

Q. What nationality are you?

A. I am Finnish.

Q. And you don't have any trouble conducting your business there, do you.

A. Well, somebody ask for something, I understand that.

Q. Now the morning that the officers came in, Mr. Rantala was the only one that was behind the bar, wasn't he?

THE COURT: That is conceded.

MR. AILSHIE: That is all.

THE COURT: That is all.

(WITNESS EXCUSED.)

MR. NORRIS: At this time, Your Honor, we will offer these exhibits, one to eight, I believe, inclusive, isn't it, Mr. Clerk?

THE CLERK: Yes, thats right.

MR. NORRIS: Do you waive the reading of them now?

MR. AILSHIE: It don't make any difference to me whether they are read or not.

MR. NORRIS: Well, we can read them to the jury or let the jury take them, one or the other. The court don't want me to read these to the jury.

THE COURT: Any objection to their going in?

MR. AILSHIE: No, I haven't any objection, if Your Honor please, and I don't think it will be necessary to read them.

MR. NORRIS: I believe that is all, Your Honor.

MR. AILSHIE: Call Mr. Foster.

J. D. FOSTER, heretofore duly sworn on behalf of plaintiff, upon being recalled in rebuttal, testified as follows:

DIRECT EXAMINATION

BY MR. AILSHIE:

Q. Mr. Foster, did you see Mr. Leisure, who testified here, the morning this search was made?

A. I saw him the morning that we went—you mean the day the arrest was made?

Q. The day this bottle was found.

A. Yes, sir.

Q. Where was he at the time you first saw him?

A. The first time I recall seeing Mr. Leisure, he was standing in the door, and had hold of the door like this, trying to get down on one foot and getting out.

Q. What was his condition at that time?

A. Pretty drunk.

Q. Was he highly intoxicated?

A. Yes, sir.

Q. Did you see him the day before when you were in there?

A. He was standing at the bar in a drunken condition that day, yes, sir.

MR. AILSHIE: That is all.

CROSS EXAMINATION

BY MR. NORRIS:

Q. Where was it you say he had this difficulty in walking?

A. He was getting out of the door. He was going out of the door. You have to step down, and he was stepping down out of the door of the place; that's the first I recall seeing him.

Q. What day was that?

A. That was the day the arrest was made.

Q. You were at that time an officer too, were you?

A. Yes, sir.

Q. Did you arrest him?

THE COURT: Is there any authority to arrest a man who isn't disturbing the peace because he is intoxicated, that is, would Mr. Foster have any authority to do that?

MR. NORRIS: Well, I don't know. I don't know that his authority is very well defined. I am not able to say.

THE COURT: I noticed you asked that before, and I wondered if there was a state law authorizing the arrest of a man who is simply intoxicated, but is not disturbing the peace.

WITNESS: There is a law, yes.

MR. NORRIS: That is what I am trying to find out.

WITNESS: Yes. But they have arrested him so much. He is drunk all the time, and they have quit arresting him or keeping him in jail. He is a kind of a privileged character.

MR. NORRIS: That is all.

MR. AILSHIE: The Government rests, Your Honor.

MR. NORRIS: I don't know of any rebuttal that we have.

THE COURT: I think, gentlemen, I will take a recess until one o'clock. Remember the hour, gentlemen,—one o'clock.

Accordingly an adjorunment was had until 1 P. M., of this day, Saturday, May 31, 1924.

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1 P. M., Saturday, May 31, 1924.

(Argument by respective counsel—omitted).

THE COURT: Gentlemen of the jury, as I think you already understand, the District Attorney filed two informations, one against Antti or Andy, as he is called, Hoiska, and the other against John Rantala. In each information the defendant is charged with the same transactions or the same wrong doing that is charged against the

other defendant in the other information. Both relate to the same time and the same place, so that counsel for the defendants and the Government have agreed together that for convenience and to save time the two cases wuold be submitted to you at the same time. But you will be required to find a separate verdict in each case. In one case you will find upon the guilt or innocence of Rantala, and in the other case upon the guilt or innocence of Hoiska. Two forms of verdict will be handed to you, in order that you may make these findings and report them.

Now, you understand, gentlemen, that these defendants (and each of them) are presumed to be innocent of the charges against them, and hence the burden was not upon them to prove their innocence, but upon the Government to establish their guilt, and to establish it by evidence which convinces you beyond a reasonable doubt. Those are familiar principles of criminal procedure with which you as citizens are already acquainted. By reasonable doubt is meant what the phrase upon its face apparently means; it is a reasonable doubt, a doubt suggested by the weakness of the evidence upon a material issue or by the positive evidence upon such issue. Generally I say to you that if, after you have fairly considered all of the evidence in the case, you feel fully convinced of the defendants' guilt as charged, that is, if you have such an abid-

ing conviction of the truth of the charge as you would be willing to act upon where the most important interests of your own lives are at stake, in that case you would have no reasonable doubt, and it would be your duty to convict. If, however, you cannot conscientiously say, after you have considered the evidence, that you have such an abiding conviction of guilt, then you would have a reasonable doubt, and it would be your duty to acquit.

Now you will understand that both of these informations are predicated upon what is known as the National Prohibition Act. In each information the first count is a charge of wrongful possession. It would be a violation of the act for either of the defendants, or both of them together, to have intoxicating liquor, or, to be more specific, to have moonshine whiskey, at this place where the officers say they found whiskey. The only exception to the general prohibition of the act relates to one's home or residence, used as a home, where, under certain circumstances, one may have intoxicating liquor for his own use and for his guests, but admittedly this was not a residence; it was a place of business; and hence the law absolutely prohibits the having of intoxicating liquor at that place, or whiskey at that place, and you will see that the law is very simple as applied to that charge.

The other count in each one of these informations sets forth a charge of maintaining a nuisance.

As I have probably explained to all of you before, I say again, that nuisance, as the term is used in the information, is to be understood in the same sense in which it is used in the National Prohibition Act, and in the National Prohibition Act it is defined simply as the maintenance of any place, whether one's home or place of business, or farm, or camp, or wherever it is, of maintaining a place where intoxicating liquors are kept for sale, in violation of the law, or are sold, in violation of the law, or manufactured. Here it is charged that this place was being maintained as a place where intoxicating liquors were kept for sale, and sold. And it is for you to say whether or not the Government has established that charge.

Now it isn't necessary that the Government prove actual sales in order to establish a charge or claim that liquors were kept there for sale. The same general rules of common sense apply to a charge of this kind as would apply to other conditions. For instance, if you went into a place and found tobacco and cigarettes and cigars in the show case, and a man behind the show case, and in other respects it appeared to be a cigar store, you as sensible men, might very reasonably conclude that that is a cigar store, and that tobaccos of different kinds, cigars, etc., are kept there for sale and are sold from time to time as there is request for them. So if you go into a place of that kind and

find intoxicating liquor in convenient access back of a bar, as it is called, a place where liquor might be served, and the liquor in such condition that it could be conveniently served, you might, as sensible men, very reasonably draw the inference that it is a place where intoxicating liquors may be purchased, in other words, where intoxicating liquor is sold as there is demand for it; and if you find that that condition existed here, then you would be warranted in reaching the conclusion that somebody was violating the law.

Now the next question is, of course, if you find that somebody was violating the law in the manner set forth in these informations, who was it, who is guilty? The defendant Hoiska admits that he was operating this place. That is an admission, of course, against his interest, and you may very well conclude that it is true, that he at least is guilty of operating the place and doing what was being done there, whatever you may find that to have been. Upon the other hand, the defendant Rantala denies that he had anything to do with the running of the place; he claims to have leased it to the other defendant, Hoiska, and some papers have been offered in evidence tending to support that contention. A paper purporting to be a lease signed by Mr. Rantala and some other papers in the nature of licenses issued, I think, by the state, for pool tables, and perhaps a license or permits by the village or city

there for some purpose, I have forgotten what now, and one or two receipts, and you can take the papers to your room and examine them. Now you are to give these papers, of course, such weight as you think they are entitled to. They are not necessarily conclusive, however. The question, after all, is,—and that is to be answered upon all of the evidence, not only the papers, but all of the circumstances of the case, as disclosed by the evidence and the relation of the parties,—the question to be answered upon all of the evidence, including these papers, is as to whether or not Mr. Rantala was in some way implicated or interested in carrying on this business, and the unlawful business, if you find that any unlawful business was being conducted there. You may consider his conduct, such as you find from the evidence it was, when the officers came in, his conduct the day before, when Mr. Foster was there, such as you find his conduct to have been from the evidence, and, as I say, all of the surroundings and circumstances, and determine from that whether or not he too was interested in operating the business. It isn't necessary under the charges that you find either one was exclusively or solely running this business. You may find that only one of them was operating it, or you may find that both of them were, depending upon what view you take of the evidence. The theory of the Government seems to be that both were interested, and

that Rantala was putting forward Hoiska as being the only one running the business, whereas he was interested and stood back of what was going on, and that, in order to avoid detection, they had this sink partly filled with water, with the container of the intoxicating liquor sitting on the drain board close by, so that the instant an officer came in one could tip it over, thus spilling the liquor in the larger body of water and thus destroying the evidence of the unlawful conduct. I say that seems to be the theory of the Government, and it is for you to say whether or not it is supported. You must believe beyond a reasonable doubt that Mr. Hoiska is guilty before you can find him guilty, and you must believe beyond a reasonable doubt that Rantala is guilty before you can find him guilty. You can't find one guilty merely because you find that the other is guilty. You must be convinced as to each one separately.

I think I need not further define what is meant by the law in denouncing the possession or sale of intoxicating liquor. I will say to you that the law expressly and in terms prohibits the possession or sale or manufacture of whiskey, and the Government contends here that this was whiskey, and if you find that it was whiskey you will have found that it is one of the things prohibited by law.

Let the officer be sworn .

Whereupon the jury turned to consider the verdict and returned into court with a verdict of guilty as charged on both counts of the information.

At this time on motion of counsel for defendant John Rantala the time for judgment or sentence was postponed to June 5th, 1924, at 2:30 o'clock P. M. on said day.

At this time both counsel for plaintiff and defendant being in open Court the counsel for John Rantala presented to the court the following motion, to-wit:

(Omitting title of court and cause)

Come now the defendant John Rantala, in open Court, the Honorable James F. Ailshie, Jr., appearing for plaintiff, and R. B. Norris appearing for the defendant, and the said R. B. Norris here moves the court that the verdict of the jury heretofore rendered in said action be set aside and annulled and that the said defendant, John Rantala be granted a new trial herein upon each of the Counts in the information upon which the said action was based for the reasons:

First, that the evidence was wholly insufficient as adduced before the said jury, to sustain a verdict of guilty upon either count in said information. Second, that one Antti Hoiska, whose case was consolidated with this one, was found guilty of pos-

session and maintaining a nuisance at the place mentioned in this information, and also the charge against Rantala being the same place of business, and there being no evidence whatever of Rantala's connection with said place of business, or having any control thereof, but on the contrary it clearly appears by the evidence that Hoiska had sole control and management of said place of business by reason of a lease thereon, and it clearly appears from the evidence that he placed the moonshine whiskey, if any was placed in said place of business, at the point where same was said to be found, himself, and the evidence fails to disclose any connection whatever between Rantala and Hoiska as to the management and control of the business conducted in said place of business or the possession of said whiskey.

Third, that the said various exhibits, to-wit, a glass jar marked———— and said to contain a small amount of moonshine and water, and the said plug to said sink, and the said glasses, being taken from the premises under a supposed search warrant should have been returned to said place of business, or destroyed, upon the application of said Hoiska and Rantala timely made before the above entitled court before the trial of said action, by the verified petition on file herein, which petition was denied by the court, and said exhibits admitted in evidence.

Fourth, and further, on account of error by the court in his instructions to the jury herein.

Signed R. B. NORRIS,
Attorney for Rantala, Residence and P. O. Address,
St. Maries, Idaho.

Which motion was by the Court denied whereupon the said Norris presented the following motion, to-wit:

(Omitting title of court and cause)

Comes now the defendant John Rantala, and moves the Court that judgment be arrested in this action, and that no judgment be pronounced against the defendant for the reasons and upon the grounds set forth in the motion for a new trial heretofore made in this action.

Attorney for John Rantala,
Residence and P. O. Address, St. Maries, Idaho.
St. Maries, Idaho.

Which motion was by the Court overruled.

At this time the said R. B. Norris asked the court to grant him thirty days to make up prepare and serve his bill of exceptions to the ruling of the Court on said motions which was granted by the court as well as to other matters of evidence objected to at the trial.

At this time the judge pronounced judgment against the defendant Rantala as shown by the records of the court in this action.

Now at this time the above entitled cause coming on to be heard on the presentation of the Bill of Exceptions herein and the court being willing that if any errors have been committed, the same may be corrected and that speedy justice be done to the defendant herein, the Court does hereby certify that the foregoing bill of exceptions correctly and fully states the proceedings complained of and all thereof; and fully and accurately sets forth the testimony and evidence outside the exhibits offered and introduced upon said trial; and contains the instructions of the court to jury except a portion thereof when the jury came into court for further instruction when the court stenographer was absent, and truly states the rulings of the Court upon the questions of law presented; and the objections made and exceptions taken by the defendant John Rantala, appearing therein which were duly taken and allowed.

Settled and allowed as the defendant John Rantala's Blil of Exceptions this 7th day of July, 1924.

FRANK S. DIETRICH,
Judge.

Endorsed.

Lodged, July 3, 1924

Filed, July 7, 1924

W. D. McREYNOLDS, Clerk.

By M. FRANKLIN, Deputy.

(Title of the Court and Cause)

ASSIGNMENTS OF ERROR

Comes now, the defendant, John Rantala, and makes the following assignments of error, which defendant avers occurred upon the trial of this cause and which defendant will rely upon in the prosecution of the Writ of Error in the above entitled cause.

1. The Court erred in denying the motion as to Rantala, that the verdict of the jury be set aside and for a new trial herein.

2. The Court erred in denying a motion on the part of Rantala that judgment as to each count in said information be arrested, and that no judgment or sentence be pronounced against Rantala on account of the insufficiency of evidence and error in instructions to the jury.

3. The Court erred in his instructions to the jury on the count in the information charging Rantala with maintaining a nuisance, to the effect that they might draw an inference against him of guilt on said count on the matters recited by the count in said instruction.

4. The Court erred in instructing the jury to the effect that they could find each or both Hoiska and Rantala, guilty of the crime of having

possession of intoxicating liquor or moonshine whiskey under the evidence herein.

5. The Court erred in admitting all of the exhibits herein offered by the Government, or any testimony in regard thereto, for the reason that they were seized under and by virtue of a void search warrant and should have been returned or destroyed as prayed for in Rantala's petition heretofore filed in this court.

6. The Court erred in failing to instruct the jury to the effect that the presumption of possession of intoxicating liquor or moonshine whiskey, if any were found in the place of business mentioned in the informations herein, would be against the proprietor or the one having the management or control of said place of business, and before Rantala could be charged with possession of same, or with maintaining a nuisance therein, some proof must be offered to show his connection with said liquor or the management of said place under the evidence adduced herein.

7. The Court erred in instructing the jury on their coming in for further instructions, and asking if they could find defendant Rantala guilty of maintaining a nuisance without finding him guilty of possession of intoxicating liquors, and the Court first replied yes, but upon further reflection, said to them that he would not advise them to do so, or

words to that effect, (the court stenographer being absent at that time and no record made of said instruction.)

Wherefore, said defendant John Rantala prays that the judgment of said Court be reversed; that such directions be given, that full force and efficiacy may inure to the defendant by reason of the assignments of error above.

R. B. NORRIS,
Residence and P. O. Address:
St. Maries, Idaho.
Attorney for Defendant,
John Rantala.

(Service acknowledged)
Endorsed, Filed June 7, 1924.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

PETITION FOR WRIT OF ERROR

Comes now, John Rantala, defendant herein, and says: That on the 7th day of June, 1924, the Court entered a judgment herein in favor of the United States of America and against John Rantala, finding said defendant guilty, based upon the verdict of the jury rendered and filed in said action, and upon said judgment of guilty sentenced the said defendant John Rantala to six months in

the Kootenai County jail, and to pay a fine of Five Hundred Dollars.

Wherefore, said John Rantala prays that a Writ of Error may issue in his behalf out of the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, for the correction of the errors so complained of and that the bond of Fifteen Hundred Dollars fixed by the Court, operate as a supersedeas and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

R. B. NORRIS,
St. Maries, Idaho, Attorney for Defendant, John Rantala.

Endorsed, Filed June 7, 1924.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

ORDER ALLOWING WRIT OF ERROR

On this day came the defendant, John Rantala, and filed herein and presented to the Court his petition praying for the allowance of a Writ of Error, and filed therewith his Assignments of Error, intended to be urged by him, and prays that the bond given operate as a supersedeas and stay

bond, and also that a transcript of the record, proceedings and papers, upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, and such other and further proceedings may be had as may be proper in the premises.

In consideration thereof the Court does allow the Writ of Error and the bond heretofore fixed and posted to operate as a supersedeas in the sum of Fifteen Hundred Dollars, is approved and the proceedings to enforce such judgment are stayed until such Writ of Error is determined.

Dated in open Court this 7th day of June, 1924

FRANK S. DIETRICH,
United States District Judge.

Endorsed, Filed June 7, 1924.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

BAIL BOND PENDING WRIT OF ERROR

We, John Rantala, as principal, and E. G. Silfrast, and John Julita, as sureties, jointly and severally acknowledge ourselves indebted to the United States of America in the sum of Fifteen Hundred Dollars, to be levied of our goods and chattels, lands and tenements, upon this condition:

Whereas, the said John Rantala has sued out a writ of error from the judgment of the District Court of the United States for the Northern District of Idaho, in case No. 2089 in said district court wherein the said United States of America is plaintiff and the said John Rantala is defendant, for a review of the said judgment in the United States Circuit Court of Appeals for the Ninth Circuit.

Now, therefore, if the said John Rantala shall personally be and appear before the said District Court on the first day of the regular term thereof, and from day to day thereafter, during said term and subsequent terms, until the determination of said writ of error, and shall abide by and perform any order or judgment which may be rendered therein ni said case, and shall pay the fine imposed by said judgment and surrender himself for imprisonment in case said judgment is affirmed, and shall not depart from said district court without leave thereof, then this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and seals this—— day of June, A. D. 1924.

A. G. SILFRAST, (Seal)
JOHN JULITA, (Seal)
.....(Seal)

Taken and approved before me this 7th day of June, W. D. McREYNOLDS, Clerk.

Approved,
FRANK S. DIETRICH, Judge.
June 7, 1924.
Endorsed, Filed June 7, 1924.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

CITATION

The President of the United States to the above named plaintiff and to E. G. Davis, attorney for plaintiff:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco in the State of California, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the United States District Court for the District of Idaho, wherein John Rantala, is the plaintiff in error, and you are attorney for the defendant in error, to show cause, if any there be, why judgment should not be corrected and speedy justice should not be done the parties in that behalf.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, this 7th day of June, A. D. 1924, and of the

independence of the United States, one hundred and forty-seven.

FRANK S. DIETRICH,
Judge of the Above Entitled Court.

Attest:
W. D. McREYNOLDS, Clerk.
(SEAL)

(Service acknowledged)
Endorsed, Filed June 7, 1924.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

WRIT OF ERROR

The United States of America.—ss.

To the Judge of the District Court of the United States for the District of Idaho, Northern Division:

Because in the record and proceeds, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Frank S. Dietrich, one of you, between United States of America, plaintiff and defendant in error, and John Rantala, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice

done to the parties aforesaid, and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, this 7th day of June, 1924.

(SEAL) FRANK S. DIETRICH,
Clerk.

Endorsed, Filed June 7, 1924.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

PRAECIPE

TO THE CLERK OF THE ABOVE ENTITLED CAUSE:

You will please include in the record of the above entitled cause to be docketed in the Circuit Court of Appeals for the Ninth Judicial Circuit, and cause to be printed as the record in said Court and send to the Clerk of Said Court of Appeals, the following records in the above entitled cause, to-wit:

Information against John Rantala and Antti Hoiska, Verdict of the jury as to both Rantala and Hoiska, Judgment and sentence of each, Bill of Exceptions of Rantala, Minutes of the Court in both cases tried together, together with order of Court settling Bill of Exceptions, Writ of Error and Citation, Petition for Writ of Error, Order allowing same, Assignments of Error, Bond on Writ of Error, Certificate to transcript of record, and this Praecipe, and oblige John Rantala defendant below and

R. B. NORRIS,
Residence and P. O. Address: St. Maries, Idaho
Attorney for Rantala.

(Service acknowledged)

Endorsed, Filed July 3, 1924.
W. D. McREYNOLDS, Clerk,
By VERNA THAYER, Deputy.

(Title of Court and Cause)

CLERK'S CERTIFICATE

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered 1 to 124, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same constitute the transcript of the record herein, upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the Praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $150.95, and that the same has been paid by the Plaintiff in Error.

Witness my hand and the seal of said Court this 6th day of August, 1924.

(SEAL) W. D. McREYNOLDS, Clerk.

4303

United States
Circuit Court of Appeals
For the Ninth Circuit

JOHN RANTALA,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to United States District Court for the District of Idaho, Northern Division.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

R. B. NORRIS,
St. Maries, Idaho,
Attorney for Plaintiff in Error.
E. G. DAVIS,
U. S. District Attorney,
W. H. LANGROISE,
and J. F. AILSHIE, JR.,
Assistant U. S. District Attorneys,
Boise, Idaho,
Attorneys for Defendant in Error.

St. Maries Gazette-Record Print.

United States
Circuit Court of Appeals
For the Ninth Circuit

JOHN RANTALA,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to United States District Court for the District of Idaho, Northern Division.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

R. B. NORRIS,
St. Maries, Idaho,
Attorney for Plaintiff in Error.
E. G. DAVIS,
U. S. District Attorney,
W. H. LANGROISE,
and J. F. AILSHIE, JR.,
Assistant U. S. District Attorneys,
Boise, Idaho,
Attorneys for Defendant in Error.

STATEMENT

In this case both Hoiska and Rantala were informed against charging in each information that each had the possession of intoxicating liquors and that each of them run this place as a nuisance.

It appears from the evidence that Rantala is the owner of the property and was in there repairing the same when the officers came in.

And it further appears without denial that the property was leased to one Hoiska without contradiction and that he was convicted of having the possession of this supposed whiskey if it was whiskey by reason alone of his being proprietor of the place and the fact of his admission that he placed this jar or container on this drain board but he says it was empty when placed there.

Mr. Marler is the only witness who testifies as to seeing this jar which was introduced in evidence over the objection of both defendants and he says it was half full of some kind of liquid and that Rantala knocked it into a sink or container of water of large size containing about six inches of water and it fell on its side and some water ran into it and when he picked it out there was about one inch of a mixture of moonshine and water in it.

That it was then taken to Spokane for analysis and left with a chemist for two hours

alone but he was never produced to testify as to its contents and it was admitted on the strength of the statement of witnesses that it had the odor of moonshine which is possible if it had formerly contained moonshine if it had none in it at the time of search of this place.

We claim that there is no legal testimony to connect Rantala with either the possession of this liquor if any there was in this place or to connect him in any way with the management of the place or running the same as a nuisance.

The parties being informed against separately it would be presumed that the Government was in doubt as to who in fact was the proprietor or running the place otherwise they should have been informed against jointly.

And when it appeared without contradiction that Hoiska was the proprietor and fully responsible for what was in there and he was convicted upon that ground although he was not near this supposed container of liquor then it would be incumbent upon the Government to show that Rantala had an interest in said business beyond a reasonable doubt and there is not a syllable of evidence upon that point.

In this case it is not a question of the sufficiency of the evidence but there is total lack of any legal evidence of Rantala's connection

with the running of said place, or possession of whiskey.

The only thing to connect Rantala with this matter is the statement of Marler that he knocked the container into this water and it fell onto its side and some water ran into it. We submit this statement taken into consideration with his cross examination is ridiculous and is impossible to have occurred but if we admit for argument's sake that Rantala did knock this container into that sink it would not make him the possessor of the contents or connect him with the maintaining of that property as a nuisance.

There are two motions in this case, one for new trial and one for arrest of judgment, both based upon the same grounds. We are aware that the motion for new trial rests in the discretion of the lower court and is not reviewable but if there was no legal evidence against Rantala the judgment should have been arrested and no judgment should have been pronounced against him.

ARGUMENT

It will be noted that there is but one point in this case and that is whether there is any legal evidence upon which to convict Rantala.

It having been shown that Hoiska had this property leased and was the exclusive prop-

rietor without denial it was incumbent upon the Government to show Rantala's connection with the management of the property by some legal and tangible evidence which was not done. If we admit for argument's sake that he did knock that container into the sink in view of the evidence where is he shown to have had possession of same and what evidence shows him to have run that place as a nuisance.

It was shown by the evidence undisputed that Hoiska had this place rented from month to month from December and that about one week before the raid he had entered into a written lease for the premises for a term and the exhibits show that Hoiska took out the license to run the place as a pool room and there are receipts for rent paid to Rantala showing the whole transaction and they are worn and show that they were not concocted for the purpose of this trial.

We are aware that the Courts are overburdened with whiskey cases and that they feel that they should use all their power to put down this traffic but we claim that the law should not be undermined and the fact should not be lost sight of that each defendant in a whiskey case should be found guilty upon evidence which shows his guilt beyond reasonable doubt and no man should be convicted upon mere suspicion.

If Rantala did knock that container into that sink that did not connect him with running the place or possessing the whiskey while he might have been charged with obstructing the officers if such was the case it would not establish the charge against him in this case.

We claim that the real proprietor having been convicted of possession and running the place as a nuisance upon the proof and assumption that he was the owner and proprietor of the place precludes the idea of Rantala being connected with the place in the absence of a showing that he had some interest therein which is not shown. It will be noted on Pages Twenty-one and Twenty-two that we are given time to prepare a bill or statement of exception to all testimony objected to as well as the court's action in overruling our motions both for new trial and to arrest judgment against Rantala.

Respectfully submitted,

R. B. NORRIS,

St. Maries, Idaho,

Attorney for Plaintiff in Error.

NO. 4307

United States

Circuit Court of Appeals

For the Ninth Circuit

J. AL PATTISON

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record

Upon Writ of Error to the District Court of the United States for the District of Oregon.

STEVENS LAW PUBLISHING CO., PORTLAND, ORE.

NO._____

United States

Circuit Court of Appeals

For the Ninth Circuit

J. AL PATTISON

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record

Upon Writ of Error to the District Court of the United States for the District of Oregon.

STEVENS LAW PUBLISHING CO., PORTLAND, ORE.

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

MR. ALFRED P. DOBSON, Gasco Bldg., Portland, Oregon,
MR. JOHN J. BECKMAN, Yeon Bldg., Portland, Oregon,
Attorneys for Plaintiff in Error.
MR. JOHN S. COKE, United States Attorney,
MR. J. O. STEARNS, JR.,
Assistant United States Attorney, Portland, Oregon,
Attorneys for Defendant in Error.

In the District Court of the United States for the District of Oregon

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. AL PATTISON,
Defendant.

CITATION ON WRIT OF ERROR

United States of America,

District of Oregon—ss.

To the United States of America and to John S. Coke,

United States Attorney for the District of Oregon, GREETING:

You are hereby cited to admonish and be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, Cali-

fornia, within thirty days from the date hereof pursuant to a writ of error filed in the clerk's office for the District Court of the United States for the District of Oregon, wherein J. Al Pattison is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland in said District this 21st day of April, 1924.

R. S. BEAN,
Judge.

Due service of the within citation accepted this 21st day of April, 1924.

JOHN S. COKE,
United States Attorney for Oregon.

(Endorsed) United States District Court, District of Oregon.
Filed April 21, 1924. G. H. Marsh, Clerk.

In the District Court of the United States for the District of Oregon

J. AL PATTISON,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

In the District Court of the United States for the District of Oregon

March Term, 1919

BE IT REMEMBERED, That on the 21st day of April, 1924, there was duly filed in the District Court of the United States for the District of Oregon, a writ of error, in words and figures as follows, to-wit:

In the United States Circuit Court of Appeals for the Ninth Circuit.

J. AL PATTISON,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

WRIT OF ERROR

The United States of America—ss.
The President of the United States of America.
To the Judge of the District Court of the United States for the District of Oregon:

GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between United States of America, plaintiff and defendant in error, and J. Al Pattison,

defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the HONORABLE WILLIAM HOWARD TAFT, Chief Justice of the United States, this 21st day of April, 1924.

(Seal) G. H. MARSH,

Clerk of the District Court of the United States for the District of Oregon.

By F. L. BUCK, Chief Deputy.

(Endorsed): Filed April 21, 1924, G. H. Marsh, Clerk United States District Court, District of Oregon, by F. L. Buck, Chief Deputy Clerk.

In the District Court of the United States for the District of Oregon

March Term, 1919

BE IT REMEMBERED, That on the 5th day of May, 1919, there was duly filed in the District Court of the United States for the Distrct of Oregon, an indictment in words and figures as follows, to-wit:

In the United States Circuit Court of Appeals for Ninth Circuit

J. AL. PATTISON,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

INDICTMENT FOR VIOLATION

Of Section 5209, Revised Statutes as Amended by the Act of September 26, 1918

United States of America,
District of Oregon—ss.

The Grand Jurors of the United States of America, for the District of Oregon, duly impaneled, sworn and charged to inquire within and for said District, upon their oaths and affirmations, do find, charge, allege and present:

COUNT ONE:

That during all of the times mentioned in this indictment The First National Bank of Linnton was, and now is, a corporation and banking association organized, incorporated and existing under and pursuant to the laws of the United States of America and was a member bank in the Federal Reserve System as defined by the Act of Congress approved December twenty-third, nineteen hundred and thirteen, known as the Federal Reserve Act, and was transacting business as such association and member bank at Portland, in the State and District of Oregon; that during all of said times, and particularly on the 13th day of December, 1918, Jerome S. Mann, a defendant above named, was a duly elected, qualified, and acting director and duly appointed, constituted, and acting officer, to-wit: cashier, of said association and member bank; that on, to-wit: the 13th day of December, 1918, at Portland, in the State and District of Oregon, and within the jurisdiction of this Court, said defendant, Jerome S. Mann, without the knowledge and consent of said association and member bank, and with the intent and purpose on the part of him, the said defendant, to injure and defraud said association and member bank and various and sundry persons, firms, and corporations then and there having money, funds and credits on deposit with said association and member bank, to the Grand Jurors unknown, did wilfully, knowingly, and unlawfully misapply money, and credits of said association and

member bank and convert the same to the use and benefit of one J. Al Pattison; that is to say: that then and there, at said times and place, one J. Al Pattison did present for deposit at said association and member bank, a certain instrument purporting to be a trade acceptance, dated November 28, 1918,, payable February 27, 1919, for the sum of $1,274.16, drawn on Cooper & Crosfield, in faver of J. Al Pattison Lumber Co., Inc., accepted on the face thereof by Cooper & Crosfield, by C. V. Cooper, manager, and signed by J. Al Pattison Lumber Co., Inc., by J. Al Pattison, and attached to said purported trade acceptance was a purported invoice of lumber of the value of $1,274.16, sold to said Cooper & Crosfield by said J. Al Pattison Lumber Co., Inc., and also a purported memorandum of a bill of lading purporting to show that said lumber of said value had been received for shipment from said J. Al Pattison Lumber Co., Inc., at Marion, Oregon, consigned to Garretson Lumber Co., at Boston, Massachusetts, over the lines and routes of the Southern Pacific Railway and Boston & Maine Railway, common carriers and connecting carriers to the Grand Jurors unkown, in car initialed CM&STP, and numbered 24478; that at said time and place, said defendant, Jerome S. Mann, then and there being and acting in his said capacity as director and cashier of said association and member bank and without the knowledge and consent of said association and member bank, and with the intent and purpose on the part of him, the said Jerome S. Mann, to injure and defraud said association and member bank and various and sundry persons, firms and corporations, as aforesaid,

did receive said purported trade acceptance with said purported invoice and said purported memorandum of bill of lading attached as aforesaid, and did deposit the same to the credit of said J. Al Pattison Lumber Co., Inc., and did credit said J. Al Pattison Lumber Co., Inc., with the sum of $1274.16, less 4% discount, on the books of said association and member bank; that thereafter said J. Al Pattison withdrew said sum of $1274.16, less 4% discount from the money, funds and credits of said association and member bank by means of checks drawn against said sum so credited as aforesaid, the exact dates and amounts of said checks being to the Grand Jurors unknown; that at said time that said purported trade acceptance with said purported invoice and purported memorandum of bill of lading was presented, received, deposited, and credited as aforesaid, said Cooper & Crosfield was not indebted to said J. Al Pattison Lumber Co., Inc., in the sum of $1274.16, or any other sum, or any sum whatsoever, and said J. Al Pattison Lumber Co., Inc., had not sold to said Cooper & Crosfield lumber of said value as set forth in said purported invoice and lumber of said value had not been received for shipment from said J. Al Pattison Lumber Co., Inc., as set forth in said purported memorandum of bill of lading, and said purported trade acceptance was not of the value of the sum of $1274.16, less 4% discount, or of any other sum whatsoever, but said purported invoice and purported memorandum of bill of lading were false, fraudulent, fictitious, and untrue, and said trade acceptance was of no value whatsoever, and said defendant, Jerome S. Mann, then and there at said time and place, knew said purported invoice and said purported memorandum of bill of lading to

be false, fraudulent, fictitious, and untrue, and said purported memorandum of bill of lading to be false, fraudulent, fictitious, and untrue, and said trade acceptance to be of no value whatsoever when the same was and were presented, received, deposited, and credited as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT NINE:

That during all of the times mentioned in this indictment, The First National Bank of Linnton, was, and now is, a corporation and banking association organized, incorporated and existing under and pursuant to the laws of the United States of America, and was a member bank in the Federal Reserve System as defined by the Act of Congress approved December twenty-third, nineteen hundred and thirteen, known as the Federal Reserve Act, and was transacting business as such association and member bank, at Portland, in the State and District of Oregon; that during all of said times and particularly on the 13th day of December, 1918, one Jerome S. Mann was duly elected, qualified, and acting director and a duly appointed, constituted, and acting officer, to-wit: cashier, of said banking association and member bank; that on, to-wit: the 13th day of December, 1918, at Portland, in the State and District of Oregon, and within the jurisdiction of this Court, J. Al Pattison, the defendant above named, with the intent

and purpose on the part of him, the said defendant, to injure and defraud said association and member bank and various and sundry persons, firms, and corporations then and there having money, funds and credits on deposit with said association and member bank, to the Grand Jurors unknown, did knowingly, wilfully, and unlawfully aid and abet said Jerome S. Mann in wilfully misapplying money, funds and credits of said association and member bank, that is to say: that then and there at said time and place, said defendant, J. Al Pattison, did present for deposit at said association and member bank, a certain instrument purporting to be a trade acceptance, dated November 28, 1918, payable February 27, 1919, for the sum of $1274.16, drawn on Copper & Crosfield, in favor of J. Al Pattison Lumber Co., Inc., accepted on the face thereof by Cooper & Crosfield, by C. V. Cooper, Manager, and signed J. Al Pattison Lumber Co., Inc., by J. Al Pattison and attached to said purported trade acceptance was a purported invoice of lumber of the value of $1274.16, sold to said Cooper & Crosfield by said J. Al Pattison Lumber Co., Inc., and also a purported memorandum of a bill of lading purporting to show that said lumber of said value had been received for shipment from said J. Al Pattison Lumber Co., Inc., at Marion, Oregon, consigned to Garretson Lumber Co., at Boston, Massachusetts, over the lines and routes of the Southern Pacific Company and Boston & Maine Railway, common carriers, and connecting carriers to the Grand Jurors unknown, in car initialed C. M. & S. T. P., and numbered 24478; that at said time and place, said Jerome

S. Mann, then and there being and acting in his said capacity as director and cashier of said association and member bank, and without the knowledge and consent of said association and member bank, did receive said purported trade acceptance with said purported invoice and said purported memorandum of bill of lading attached as aforesaid, and did deposit the same to the credit of said J. Al Pattison Lumber Co., Inc., and did credit said J. Al Pattison Lumber Co., Inc., with the sum of $1274.16, less 4% discount, on the books of said association and member bank; that thereafter said defendant, J. Al Pattison withdrew said sum of $1274.16, less 4% discount, from the money, funds and credits, of said corporation and member bank by means of checks drawn against said sum so credited as aforesaid, the exact dates and amounts of said checks being to the Grand Jurors unknown; that at said time that said purported trade acceptance with said purported invoice and purported memorandum of bill of lading was presented, received, deposited, and credited as aforesaid, said Cooper & Crosfield was not indebted to said J. Al Pattison Lumber Co., Inc., in the sum of $1274.16, or any other sum, or any sum whatsoever, and said J. Al Pattison Lumber Co., Inc., had not sold to said Cooper & Crosfield lumber of said value as set forth in said purported invoice and lumber of said value had not been received for shipment from said J. Al Pattison Lumber Co., Inc., as set forth in said purported memorandum of bill of lading, and said purported trade acceptance was not of the value of the sum of $1274.16, or any other sum, or any sum whatsoever,

but said purported invoice and purported memorandum of bill of lading were false, fraudulent, fictitious, and untrue, and said trade acceptance was of no value whatsoever, and said Jerome S. Mann and said defendant J. Al Pattison, then and there at said time and place knew said purported invoice and said purported memorandum of bill of lading to be false, fraudulent, fictitious, and untrue, and said purported trade acceptance to be of no value whatsoever when the same was and were presented, received, deposited, and credited as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Portland, Oregon, this 5th day of May, 1919.

A TRUE BILL.

WALTER GADSBY,

Foreman, United States Grand Jury.

JOHN C. VEATCH,

Assistant United States Attorney.

(Endorsed) Filed May 5, 1919, in open Court. G. H. Marsh, Clerk.

RECORD OF PLEA OF GUILTY

AND AFTERWARDS, to-wit, on Monday, the 7th day of July, 1919, the same being the first judicial day of the regular July term of said Court; present the HONORABLE ROBERT S. BEAN, United

States District Judge, presiding, the following proceedings were had in said cause, to-wit:

Now at this day come the plaintiff by Mr. Bert E. Haney, United States Attorney, and Mr. John C. Veatch, Assistant United States Attorney . . . and the defendant J. Al Pattison in his own proper person and by Mr. Alfred P. Dobson, of counsel . . .

Whereupon for plea to the indictment herein . . . the defendant J. Al Pattison for himself says he is guilty as charged in said indictment.

RECORD OF VERDICT OF ACQUITTAL OF JEROME S. MANN

AND AFTERWARDS, to-wit, on Saturday, the 12th day off July, 1919, the same being the 6th judicial day of the regular July term of said Court; present the HONORABLE ROBERT S. BEAN, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

Now at this day come the plaintiff by Mr. Bert E. Haney, United States Attorney, and Mr. John C. Veatch, Assistant United States Attorney, and the defendant Jerome S. Mann in his own proper person and by Mr. Wallace McCamant and Mr. Albert B. Ridgway, of counsel. Whereupon the jury impanelled herein come into Court, answer to their names, and in accordance with the consent and agreement of the parties hereto, and the order of the Court return to the Court their duly sealed verdict herein, viz:

"We, the jury duly empanelled and sworn to try the above entitled cause, do find the defendant, Jerome S. Mann, not guilty as charged in the indictment.

Dated at Portland, Oregon, this 11th day of July, 1919.

J. A. THORNBURGH,
Foreman."

Which verdict is received by the Court and ordered to be filed.

RECORD OF SENTENCE

AND AFTERWARDS, to-wit, on Friday, the 31st day of October, 1919, the same being the 101st judicial day of the regular July term of said Court; present the HONORABLE ROBERT S. BEAN, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

Now at this day come the plaintiff by Mr. John C. Veatch, Assistant United States Attorney, and the defendant J. Al Pattison in his own proper person; whereupon this being the day set for the sentence of the said defendant J. Al Pattison upon the plea of guilty heretofore entered to the indictment herein,

It is adjudged that said defendant do pay a fine of $500.00 and that he stand committed to the County Jail of Multnomah County, Oregon, until said fine be paid or until he be discharged according to law, and that said defendant be and he is hereby allowed thirty days from this date within which to pay said fine.

RECORD OF EXTENSION OF TIME TO PAY FINE

AND AFTERWARDS, to-wit, on Monday, the 1st day of December, 1919, the same being the 24th judicial day of the regular November term of said Court; present the HONORABLE ROBERT S. BEAN, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

Now at this day come the plaintiff by Mr. John C. Veatch, Assistant United States Attorney, and the defendant above named by Mr. Alfred P. Dobson, of counsel. Whereupon on motion of said defendant,

It is ordered that said defendant, J. Al Pattison, be and he is hereby allowed thirty days further time within which to pay the fine heretofore imposed upon him herein by the Court.

RECORD OF ORDER FOR COMMITMENT

AND AFTERWARDS, to-wit, on Thursday, the 2nd day of August, 1923, the same being the 28th judicial day of the regular July term of said Court; present the HONORABLE CHARLES E. WOLVERTON, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

Now at this day comes the plaintiff by Mr. Joseph O. Stearns, Jr., Assistant United States Attorney, and moves the Court for an order for a bench warrant to issue herein for the arrest of the above named defendant, J. Al Pattison; and it appearing to the Court that on October 31, 1919, the defendant was

duly convicted of the offense charged in the indictment herein, and was sentenced by the Court to pay a fine of $500.00 and to stand committed until said fine was paid; and it further appearing that service of said commitment was by order of Court staid, and that the time of said stay has long since expired and that said fine has not been paid.

It is ordered that a bench warrant issue for the arrest of said defendant, and that he be brought before this Court forthwith to show cause why the fine should not be paid or he should not be committed in accordance with the judgment of this Court, and

It is further ordered that the said defendant be admitted to bail in the sum of $750.00 to answer to the Court in accordance with this order.

(Whereupon a commitment was duly issued pursuant to the above order, and was returned "not found" on August 8, 1923, by the United States Marshal for said District.)

AND AFTERWARDS, to-wit, on Friday, the 7th day of April, 1924, the same being the 31st judicial day of the regular March term of said Court; present the HONORABLE ROBERT S. BEAN, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

This cause was heard by the Court upon motion filed herein by the plaintiff for a commitment to issue for the above named defendant J. Al Pattison and upon the oral motion of defendant in open Court for the remission of the penalty imposed by the

Court herein upon said defendant, plaintiff appearing by Mr. Joseph O. Stearns, Jr., Assistant United States Attorney, and defendant J. Al Pattison in person and by Mr. A. P. Dobson of counsel, and the Court having heard the arguments of counsel and being fully advised in the premises.

It is ordered, that said motion for remission of penalty be and the same is hereby denied, and that the said motion of plaintiff for commitment to issue be and the same is hereby allowed and that commitment issue forthwith for the said defendant in accordance with the judgment of the Court heretofore entered herein.

AND AFTERWARDS, to-wit, on the 7th day of April, 1924, there was issued out of said Court, a commitment, in words and figures, as follows, to-wit:

ORDER OF COMMITMENT

In the District Court of the United States for the District of Oregon

UNITED STATES OF AMERICA,

vs.

J. AL PATTISON.

No. C8428

For Violation of Section 5209 R. S.

The United States of America,
District of Oregon—ss.
The President of the United States of America.
To the Marshal of the District of Oregon, or to his

Deputy; to the Keeper of either of the Jails in our said District; to the Warden of the United States Penitentiary, McNeil Island, Wash.—GREETING:

WHEREAS, at the March, 1919, term of the above-entitled Court, J. Al Pattison was duly convicted of the crime of aiding and abetting in the misapplication of funds by a National Bank official, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America, for which offense he hath this day been sentenced by our said Court to pay a fine of Five Hundred and no/100 Dollars ($500.00) and to be imprisoned in the County Jail of Multnomah County, Oregon, and to stand committed until this sentence be performed.

NOW, THIS IS TO COMMAND YOU, the said Marshal or Deputy, to take and keep and safely deliver the said Defendant, J. Al Pattison, into the custody of the Keeper or Warden in charge of said prison, forthwith.

AND THIS TO COMMAND YOU, the said Keeper or Warden in charge of the said prison, to receive from the said Marshal or Deputy the said Defendant J. Al Pattison, convicted and sentenced as aforesaid and him keep and imprison in accordance with said sentence, or until he be otherwise discharged by law. Hereof fail not at your peril.

WITNESS the HONORABLE CHARLES E.

WOLVERTON and the HONORABLE ROBERT S. BEAN, Judges of our said Court, and the seal thereof affixed at Portland, in said District, this 7th day of April, 1924.

G. H. MARSH,
Clerk.

(Seal of Court)

F. M. BROWN,
Deputy Clerk.

In the District Court of the United States for the District of Oregon

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. AL PATTISON,
Defendant.

PETITION FOR WRIT OF ERROR

To the Honorable Charles E. Wolverton and Robert S. Bean, Judges of the above entitled Court:

Comes now J. Al Pattison, defendant herein, by his attorneys, Alfred P. Dobson and John J. Beckman, and respectfully shows:

That on October 31, 1919, the above entitled Court imposed upon your petitioner a fine of $500.00 in the above entitled cause and adjudged that he stand committed to the County Jail of Multnomah County, Oregon, until said fine be paid and he be discharged according to law and that subsequently, on April 7, 1924, the above entitled Court upon motion of the

plaintiff herein, entered an order that a commitment be issued upon said judgment and overrule the motion of the said defendant that the said commitment be not issued and that the fine thereto imposed be remitted and set aside, and the said Court thereupon issued said commitment.

Your petitioners feeling themselves agreed by the said judgment and the said order issuing said commitment and denying said defendant's motion as aforesaid and by the issuance of said commitment certain erors were committed in connection therewith to the prejudice of this defendant, all of which will more fully appear from the bill of exceptions and the assignment of errors filed with this petition, and this defendant doth herewith petition the Honorable Court for an order allowing him to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit under the rules and laws of the United States in such cases made and provided.

WHEREFORE, this defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of and that an order be made approving the bond of your petitioner and staying all further proceedings until determination of such writ of error by said Circuit Court of Appeals, and that a transcript of the records, proceedings and papers in this cause duly authenticated may be sent to the United States Cir-

cuit Court of Appeals for the Ninth Circuit.

J. AL PATTISON,
Defendant.

JOHN J. BECKMAN,
ALFRED P. DOBSON,
Attorneys for Defendant.

United States of America,
District of Oregon—ss.

Due and legal service of the foregoing petition is hereby accepted at Portland, Oregon, this 21st day of April, 1924.

JOHN S. COKE,
United States Attorney for Oregon.

(Endorsed): United States District Court, District of Oregon. Filed April 21, 1924. G. H. Marsh, Clerk.

In the District Court of the United States for the District of Oregon

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. AL PATTISON,
Defendant.

ASSIGNMENT OF ERRORS

J. Al Pattison, the defendant in the above entitled action and plaintiff in error herein, having petitioned for an order from the above entitled Court permitting

him to procure a writ of error to this Court directed from the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, sentence, order of commitment and commitment made and entered in said cause against the said plaintiff in error, and petitioner herein now makes and files with said petition the following assignment of errors herein upon which he will rely for a reversal of the said judgment, sentence, order and commitment upon the said writ and which said errors, and each and every of them, are to the great detriment, injury and prejudice of the said plaintiff in error and in violation of the rights conferred upon him by law; and plaintiff in error says that in the record and proceedings of the above entitled cause upon the hearing and determination thereof in the District Court of the United States for the District of Oregon there are manifest errors in this, to-wit:

1. That the Court erred in entering a judgment of guilty and sentencing the said defendant to pay a fine of $500.00 and to stand committed to the County Jail of Multnomah County, Oregon, until said fine be paid or until he be discharged according to law.

2. That the Court erred in making and entering the order of date April 7, 1924, directing that a commitment issue forthwith for the defendant, J. Al Pattison, in accordance with the judgment of the Court theretofore entered in said cause.

3. That the Court erred in overruling the motion of the defendant, J. Al Pattison, that the said com-

mitment be not issued and that the fine of $500.00 theretofore entered be remitted and set aside.

4. That the Court erred in issuing the commitment for the said defendant of date April 7, 1924.

WHEREFORE on account of the errors above assigned the said commitment against the said defendant and the order committing him ought not to have been made, entered or issued and the said defendant should have been allowed to go hence without day, now the said defendant prays that the sentence to pay the fine of $500.00 and the order of commitment and commitment aforesaid of said Court should be reversed and set aside and that this cause be remanded to the said District Court and such directions be given that the above errors may be corrected and law and justice done in the matter.

Dated this 21st day of April, 1924.

ALFRED P. DOBSON,
JOHN J. BECKMAN,
Attorneys for Defendant.

Service acknowledged this 21st day of April, 1924.

JOHN S. COKE,
United States Attorney.

(Endorsed): United States District Court, District of Oregon. Filed April 21, 1924. G. H. Marsh, Clerk.

In the District Court of the United States for the District of Oregon

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. AL PATTISON,
Defendant.

BILL OF EXCEPTIONS

BE IT REMEMBERED, That on July 7, 1919, Jerome Mann, one of the defendants named in the indictment in the above entitled cause, entered a plea of not guilty in open court and thereupon a jury was empaneled and sworn to try the said Jerome Mann on said indictment. That said trial thereupon proceeded and during the course of same the defendant, J. Al Pattison, was called as a witness for the United States and upon being sworn gave testimony on behalf of the United States.

That on March 24, 1924, the United States of America by J. O. Stearns, Jr., Assistant United States Attorney for Oregon, appeared in open court and orally moved that the Court make an order directing that a commitment issue forthwith for the arrest of said defendant, J. Al Pattison, and his commitment in the County Jail of Multnomah County, Oregon, until his fine be paid according to the judgment of the Court in the above entitled cause of date October 31, 1919. That at said time in said Court the

said J. Al Pattison appeared by Alfred P. Dobson, Esq., his attorney, and opposed said motion and said defendant by his said attorney orally moved the Court that the said commitment be not issued and that the judgment of the Court of date October 31, 1919, wherein the Court imposed a fine of $500.00 upon said defendant be set aside and that the said fine be remitted upon the ground and for the reason that it appeared from the indictment in said cause that the said defendant, Jerome Mann, was charged with violation of Section 5209 U. S. R. S. as amended and the said J. Al Pattison was only charged in said indictment with being an accessory to the said Jerome Mann by aiding and abetting the said Jerome Mann in the commission of the particular crimes charged in said indictment to have been committed by him, the sad Jerome Mann, and that a jury having returned a verdict of not guilty upon the separate trial of Jerome Mann, the said J. Al Pattison could not be guilty of being an accessory and the plea theretofore made was a nullity and that the fine imposed should be remitted and set aside. The Court thereupon heard the argument of respective counsel upon said motions and took the same under advisement.

And now because the foregoing matters and things are not of record in this cause I, R. S. Bean, Judge of the District Court of the United States for the District of Oregon, and the judge trying the above entitled action in said Court, hereby certify that the foregoing bill of exceptions truly states all the pro-

ceedings not of record had in the above entitled Court in the above entitled cause with reference to the sentence, order of commitment and commitment of the defendant, J. Al Pattison, which order and commitment are of record in this cause.

Within the time allowed by the Court the defendant, J. Al Pattison, presented this his bill of exceptions, which is hereby allowed.

Dated this 21st day of April, 1924.

R. S. BEAN,
District Judge.

Due service of the within Bill of Exceptions is hereby accepted this 21st day of April, 1924.

J. D. STEARNS, JR.,
Asst. United States Attorney for Oregon.

(Endorsed): United States District Court, District of Oregon.

Filed April 21, 1924. C. H. Marsh, Clerk.

In the District Court of the United States for the District of Oregon

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. AL PATTISON,
Defendant.

ORDER ALLOWING WRIT OF ERROR

Now at this day comes the defendant, J. Al Pattison, in the above entitled cause by Alfred P. Dobson, Esq., and John J. Beckman, Esq., his counsel, and present to the Court their petition praying for the allowance of a writ of error to be issued out of the United States Circuit Court of Appeals for the Ninth Circuit, to review the judgment and orders of this Court entered in said cause and move the Court for an order allowing said petition:

On consideration whereof it is ORDERED that the writ of error issue as prayed for in said petition.

It is further ORDERED that all proceedings in the above entitled District Court be stayed, superseded and suspended until the final disposition of the writ of error in the aforesaid United States Circuit Court of Appeals for the Ninth Circuit upon said defendant filing an undertaking in the sum of $750, to be approved by the Court.

Dated at Portland, Oregon, this 21st day of April, 1924.

R. S. BEAN,
Judge.

(Endorsed): United States District Court, District of Oregon.

Filed April 21, 1924. G. H. Marsh, Clerk.

In the District Court of the United States for the District of Oregon

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. AL PATTISON,
Defendant.

BOND

KNOW ALL MEN BY THESE PRESENTS, that we, J. Al Pattison, as principal and Minnie L. Wade and George W. Pattison, as sureties, are held and firmly bound unto the United States of America in the penal sum of Seven Hundred Fifty and 00/100 Dollars ($750.00) to be paid to the United States of America for the payment of which well and truly to be made we bind ourselves, and each of us, our heirs, executors, administrators, successors and assigns, forever firmly by these presents.

Sealed with our seals and dated and signed this 21st day of April, 1924.

WHEREAS, on the 31st day of October, 1919, in the District Court of the United States for the District of Oregon in a certain case therein pending wherein the United States of America was plaintiff and the said J. Al Pattison was defendant and judgment was rendered against the said defendant wherein and whereby the said defendant was sentenced to pay to the said United States of America a fine in the sum of $500.00 or in lieu of the payment of said fine to be imprisoned in the County Jail at Multnomah

County at Portland, Oregon, until such fine was paid, and thereupon on April 7, 1924, and in said Court said Court made an order of commitment whereby the said defendant was committed to the County Jail in lieu of the payment of said fine and the said defendant has prayed for and obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to review the said judgment, sentence and commitment in the aforesaid action and a citation directing the United States to be and appear in the said United States Court of Appeals for the Ninth Circuit at San Francisco, California, 30 days from and after the date of said citation has issued, which citation has been duly served.

Now the condition of this obligation is such that if the said J. Al Pattison shall appear either in person or by attorney in the said Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said Court and prosecute this writ of error and abide by the orders made by the said United States Circuit Court of appeals and shall surrender himself in execution as said Court may direct if the judgment and sentence against him shall be affirmed, then this obligation shall be void; otherwise to be and remain in full force and effect.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 21st day of April, 1924.

J. AL PATTISON, (Seal)
Principal.

MINNIE L. WADE, (Seal)
Surety.
GEORGE W. PATTISON, (Seal)
Surety.

United States of America,
District of Oregon—ss.
County of Multnomah.

I, Minnie L. Wade, residing at 2153 E. Ankeny Street, Portland, Oregon, being first duly sworn, say: That I am a resident and free-holder in the State of Oregon and that I am worth the sum of One Thousand $1000.00) Dollars over and above all my just debts and liabilities and exclusive of property exempt from execution.

MINNIE L. WADE.

Subscribed and sworn to before me this 21st day of April, 1924.

JOHN J. BECKMAN,
(Notarial Seal) Notary Public for Oregon.
My commission expires February 25, 1925.

United States of America,
District of Oregon—ss.
County of Multnomah.

I, George W. Pattison, residing at 1701 East Seventeenth Street, Portland, Oregon, being first duly sworn, say: That I am a resident and free-holder in the State of Oregon and that I am worth the sum of One Thousand ($1000.00) Dollars over and above

all my just debts and liabilities and exclusive of property exempt from execution.

GEORGE W. PATTISON.

Subscribed and sworn to before me this 21st day of April, 1924.

JOHN J. BECKMAN,
(Notarial Seal) Notary Public for Oregon.
My Commission Expires February 25, 1925.

The above bond approved April 21st, 1924.

R. S. BEAN,
United States District Judge.

(Endorsed): United States District Court, District of Oregon.

Filed April 21, 1924. G. H. Marsh, Clerk.

In the District Court of the United States for the District of Oregon

UNITED STATES OF AMERICA,
vs.
J. AL PATTISON,
Defendant.

STIPULATION AS TO RECORD

It is hereby stipulated by and between the United States of America by Joseph O. Stearns, Jr., Assistant United States Attorney for the District of Oregon, and J. Al Pattison, the defendant, by John J. Beckman, of counsel; that the following documents, papers and records in the above entitled cause shall

be included in the transcript of record in the said cause and that the same are all the necessary documents, papers and records to be considered in reviewing the said case on writ of error, to-wit: Indictment, citation, writ of error, petition for writ, order allowing writ, bill of exceptions, assignments of error, bond, pleas of guilty, record of acquittal of Jerome S. Mann, record of sentence, record of extension of time to pay fine, record of order for commitment, commitment, this stipulation.

It is further hereby stipulated between the respective parties hereto that said indictment consists of 16 counts and that counts 2 to 7 both inclusive thereof, charge defendant, Jerome S. Mann, with offenses similar to the crime charged in count 1 herein set out in full and that said Jerome S. Mann was in one trial acquitted as to each and all of said counts, and that counts 10 to 16 both inclusive, of said indictment, charged defendant, J. Al Pattison, with offenses similar to that charged against him in count 9 of said indictment herein set out in full, and that said counts 10 to 16 respectively charged J. Al Pattison with aiding and abetting Jerome S. Mann in the commission of the crimes charged in counts 2 to 8 respectively, and that for the purpose of considering the assignments of error herein set forth said counts 2 to 8 inclusive and 10 to 16 inclusive, may be omitted for the sake of brevity.

It is further hereby stipulated between the respective partes hereto that plaintiff in error has in due time obtained from one of the judges of the United

States District Court and filed herein sundry extensions of time to file this transcript up to August —, 1924.

It is further hereby stipulated betwee nthe respective parties hereto that the foregoing printed record now tendered to the Clerk of the above entitled Court for his certificate and filed in the above cause, is a true transcript of the record in said cause and that the said Clerk may certify said transcript to the United States Circuit Court of Appeals for the Ninth Circuit without comparing the same with the original record which is on file herein.

Dated this 9th day of August, 1924.

JOSEPH O. STEARNS, Jr.,
Attorney for Plaintiff.

JOHN J. BECKMAN,
of Attorneys for Defendant.

(Endorsed): Filed August 13, 1924. G. H. Marsh, Clerk.

In the District Court of the United States for the District of Oregon

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. A. PATTISON,
Defendant.

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing printed transcript of record on writ of error in the case of J. Al Pattison, plaintiff in error, vs. United States of America, defendant in error, is a true transcript of the record in said cause in said Court. This certificate is made without comparing the said transcript of record with the original record in said cause, pursuant to the stipulation of the parties therein, that this record may be certified to by me to be a true copy, without comparison.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Court in said District this 15 day of August, 1924.

G H Marsh

Clerk.

No. 4307

United States
Circuit Court of Appeals
For the Ninth Circuit

7

J. AL PATTISON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error

ALFRED P. DOBSON and
JOHN G. BECKMAN,
Attorneys for Plaintiff in Error.

JOHN S. COKE, United States Attorney, and
J. O. STEARNS, JR.,
Asst. United States Attorney,
Attorneys for Defendant in Error.

STEVENS LAW PUBLISHING CO., PORTLAND, ORE.

United States
Circuit Court of Appeals
For the Ninth Circuit

J. AL PATTISON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error

STATEMENT

The defendant, J. Al Pattison, was indicted jointly with one Jerome Mann, under Section 9772 U. S. Compiled Statutes (5209 Revise Statutes, Act of September 26, 1918), which reads in part as follows:

> "Any officer, director, agent or employe of any Federal Reserve Bank or of any member bank as defined in the Act of December 23, 1913, known as the Federal Reserve Act, who . . .

> wilfully misapplies any of the moneys, etc., of such Federal Reserve Bank or member bank . . . with intent in any case to injure or defraud such Federal Reserve Bank or member bank or any other corporate body politic or corporate, or aany individual person, or to deceive any officer of such Federal Reserve Bank or member bank, or the comptroller of the currency or any agent or examiner appointed to examine the affairs of such Federal Reserve Bank or member bank or Federal Reserve Board . . . and every person who with like intent aids or abets any officer, director, agent, employe . . . in violation of this section, shall be deemed guilty of a misdemeanor and upon conviction thereof in any District Court of the United States shall be fined not more than $5000.00, or shall be imprisoned not more than five (5) years or both, in the discretion of the court."

Prior to the trial of Mann, the defendant, Pattison, entered a plea of guilty, whereupon he was fined $500.00.

Thereafter the defendant, Mann, was tried and acquitted, and based upon such acquittal, Pattison, through his attorneys, applied to the court for an order remitting the fine, urging in support thereof that Mann's guilt of the crime charged must first be proved before there could be any conviction of Pattison as an accessory, and further that the acquittal

of Mann was in effect a finding that the crime charged had not been committed. The crime charged was that Mann had misapplied funds of the First National Bank of Linnton, Linnton, Oregon, and that Pattison had aided and abettted in such misapplication.

On April 7, 1924, after hearing argument of counsel, the Honorable R. S. Bean, ruled that said application would have to be denied, stating:

> "This case was submitted on an application for the remission of a fine imposed upon the defendant by the court some months ago.
>
> Pattison was indicted for aiding and assisting one Mann to violate the National Banking Act. The indictment charged Mann as the principal and Pattison as aiding and assisting. Pattison entered a plea of guilty and was fined five hundred dollars. Later Mann was tried and acquitted and it is now insisted that inasmuch as Mann was acquitted Pattison could not have been guilty of aiding and assisting him to commit a crime of which he was subsequently found not guilty, but it appears from the record that Pattison's plea of guilty was entered before Mann's trial, and necessarily was an admission of every material allegation in the indictment, and among the material allegations was the charge that Mann had unlawfully misapplied the bank's

funds, and that Pattison had aided and assisted him in doing so. As the record thus stood, Pattison was unquestionably guilty. He entered a plea of that kind. If he had been tried, it would have been necessary for the government to prove that Mann was guilty and that Pattison aided and assisted him to commit the crime. Now the fact that after that Mann was tried and acquitted does not, in my judgment, affect Pattison's guilt, because there may have been many reasons why Mann was acquitted when he came to trial. It may have been failure of proof; it may have been the failure of the government to prove material allegations of the indictment; it may have been on the ground of venue, or there may have been many other reasons, so I conclude the motion is not well taken.

The defendant relies mainly upon the case of United States vs. Pyle, decided by the District Court in Los Angeles. In that case Pyle and Connor were jointly indicted and jointly tried. The principal was acquitted but the jury found that the defendant, who was charged with aiding and assisting guilty, and upon a motion for a new trial, the court set the judgment aside, and very properly, because the case was submitteed on the evidence and the jury could not consistently have found the defendant guilty of aiding and assisting a man whom they found, on the same testimony, to be not guilty. But that case has no bear-

ing on the question now before us, and for these reasons the motion will be overruled."

POINTS AND AUTHORITIES

I.

The abstraction or misapplication of funds of a national bank is an offense which under Section 9772 U. S. Compiled Statutes (5209 Revise Statutes), can only be committed by an officer or attache of a national bank.

U. S. vs. Pyle, 279 Fed. 290-92.

II.

Before one who is charged as an aider or abettor in the misapplication of funds of a national bank can be deemed guilty as such, it is incumbent upon the government to first establish the guilt of the principal.

U. S. vs. Pyle, 279 Fed. 290-92.

Coffin vs. U. S., 162 U. S. 664.

III.

A plea of guilty by one charged as an aider or abettor in the misapplication of funds of a national bank does not establish the guilt of the principal and as such offense can only be committed by an officer or attache of the bank, an acquittal of such officer or at-

tache renders the statute and indictment thereunder wholly inoperative as against such accessory, notwithstanding his plea of guilty.

U. S. vs. Pyle, 279 Fed. 290.

ARGUMENT

On this appeal plaintiff relies upon the decision of Judge Bledsoe in the case of United States vs. Pyle, et al, reported in 279 Fed. 290. In that case, Conner, the accessory, was tried with Pyle, the principal, and found guilty, whereas Pyle was acquitted. In considering whether the verdict would stand against Conner, that court stated:

> "There is no general statute to which my attention has been directed making it a federal offense to commit a larceny or pilfering of the assets of a national bank. Neither is there any general statute giving to federal courts the jurisdiction to punish the obtaining of the property of a national bank through fraudulent representations. Such matters are left to the concern and disposition of the various state governments, which in the exercise of their respective sovereignties enact and enforce general laws intended to preserve the peace, good order and rights of property of society in general. I am persuaded, therefore, that the aim and intent of this statute, in creating a federal offense, was to make

it an offense cognizable by the federal courts only in the event that the abstraction or misapplication of the funds of a national bank should be committed by an officer or attache thereof.

In that event, therefore, there is no crime committed under the statute, unless the act charged be committed by one of the specific persons named in the statute, that is, by one of the officers or attaches of the bank; and in order further to protect the bank, but purely as incidental to the main purpose and intention of the statute, if such officer of the bank be aided and abetted by another, one on the outside, or even by another bank official, that other, under the statute, will also be subject to punishment as for such aiding and abetting. In this wise, irrespective of the things actually done or the results actually brought about, if there has been no crime committed by the officer of the bank, there is no crime known to the federal law committed by one not connected with the bank. In other words, there can be no incident without the principal; there can be no aiding and abetting with respect to the misapplication of the funds of a national bank, of which this court under this statute has jurisdiction, if there has been no misapplication by an officer of the bank.

In this case the charge was that Conner aided and abetted Pyle, an officer of the bank, in mis-

> applying its funds. The jury have acquitted Pyle, which is a legal demonstration of his innocence of the crime charged. It is a conclusive determination that there was no misapplication by him of the funds of the bank with intent to defraud. That being so, there was no crime under this statute which Conner could or did aid and abet; and in that wise the determination of the innocence of Pyle determines the non-existence of any crime subject to the jurisdiction of this court committed by Conner."

On behalf of the Defendant in Error, it is contended that the above quoted decision is not in point for the reason that Pattison prior to Mann's trial admitted every material allegation contained in the indictment which included the charge that Mann with intent to defraud had misapplied the bank's funds, and that he, Pattison, had aided and abetted therein. That is but another way of saying that Pattison's admission of Mann's guilt is final and conclusive of such question irrespective of the fact that the jury after hearing the evidence concluded to the contrary. If the guilt of the principal was a prerequisite to the conviction of Pattison (and it is conceded that such is the force and effect to be given the statute in question), Mann's acquittal should be an absolute bar to any judgment against Pattison, notwithstanding his plea of guilty. To conclude otherwise requires the court to accept such plea in lieu of a judicial finding to the contrary.

The guilt or innocence of Mann may have had nothing whatever to do with Pattison's plea of guilty. Such plea may have been prompted by motives entirely foreign to any such question. We have just as much right to speculate as to the reasons or motives prompting Pattison's plea of guilty as the trial court had to speculate on the motive or reasons prompting the jury to acquit Mann.

Under the authority above quoted from, we do not believe it is permissible to ignore the verdict of the jury in this case. After a full and complete hearing its verdict was that the defendant, Mann as principal, had not misapplied the funds of the bank in question. Under the construction placed upon the statute pursuant to which Pattison was indicted, he would be incapable of committing the crime charged therein. He was not an officer or an attache of the bank in question and the crime charged could not have been committed by him alone. There appears to be no legal support for the judgment against Pattison and the fine imposed by virtue thereof should be remitted.

Respectfully submitted,

ALFRED P. DOBSON and

JOHN G. BECKMAN,

Attorneys for Plaintiff in Error.

No. 4307

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. AL. PATTISON,
Plaintiff in Error

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the District Court of the United States for the District of Oregon.

JOHN S. COKE,
United States Attorney for the District of Oregon.

J. O. STEARNS, Jr.,
Assistant United States Attorney

For Defendant in Error.

ALFRED P. DOBSON,

JOHN G. BECKMAN,
Attorneys for Plaintiff in Error.

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No. 4307

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. AL. PATTISON,
Plaintiff in Error

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the District Court of the United States for the District of Oregon.

JOHN S. COKE,
United States Attorney for the District of Oregon.

J. O. STEARNS, Jr.,
Assistant United States Attorney

For Defendant in Error.

ALFRED P. DOBSON,

JOHN G. BECKMAN,
Attorneys for Plaintiff in Error.

POINTS AND AUTHORITIES.

I.

The common law rule that in felonies the principal must be tried and convicted before his accessory, does not now obtain in trials in the federal courts, since there exists a general statute making accessories principals in fact and punishable as such.

United States vs. Hillegass, 176 444-447,
See Paragraph 2.
Sections 332 and 335, Federal Penal Code.
Rooney vs. United States, 204 Fed. 928.

II.

One jointly indicted with an officer of a federal reserve bank, or member bank, and charged with aiding and abetting such officer in the commission of an offense denounced by Section 9772, United States Compiled Statutes (5209 R. S.) by his plea of guilty admits every material allegation of the indictment and may be punished accordingly, notwithstanding the subsequent trial and acquittal of such officer.

United States vs. Rooney, supra.
United States vs. Hillegass, supra.

ARGUMENT

The statement of facts as set out in the brief of Plaintiff in Error is substantially correct. We therefore turn immediately to discussion of what we conceive to be the law of the question.

In this appeal, Plaintiff in Error relies upon the case of United States vs. Pyle, and cites no other authority to uphold his contention. It seems superfluous to say that the Pyle case is easily distinguishable from the case at bar, and that it affords no guide to a solution of the question now before the Court. In the Pyle case all that the Court decided, and all that the Court could decide was that Connor, the accessory, and Pyle, the principal, having been jointly tried and the verdict of the jury having found Connor guilty and Pyle not guilty, there existed such patent inconsistency that the verdict as to Connor could not be allowed to stand.

It is clear, upon a reading of Section 9772, U. S. Compiled Statutes (5209 R. S.) that, before an aider and abettor may be found guilty and punished for an offense thereunder, the guilt of his principal must be established, either by the verdict of a jury or by a plea of guilty on the part of the aider and abettor, which plea would, of course, amount to the same

thing. However, it is well established and beyond controversy that, by virtue of the provisions of Sec. 332 of the Federal Penal Code of 1910, any person who aids, abets, counsels, commands, induces or procures the commission of any offense defined in any law of the United States becomes, in fact, a principal and is punishable as such. We think it is also beyond controversy that such aider and abettor my be tried separately from the principal offender and that if he be found guilty, the verdict will stand, notwithstanding that his principal may be found not guilty. (Sec. 332 and 335 Federal Penal Code, U. S. vs. Hillegass, 176 Fed. 444, page 2.)

In this case, Plaintiff in Error entered a plea of guilty to the charges set out in the indictment. That plea was an admission of every material allegation in the complaint. It was an admission by Pattison, not only of the truth of the wrongful acts charged against him, but of those charged against his principal, Mann, as well. If we are right in our belief that Pattison in this case could have been tried before his co-defendant, Mann, then, of course, there could be no question that the Court had jurisdiction to entertain his plea of guilty prior to the trial of the defendant, Mann. If the Court had jurisdiction

to entertain such plea of guilty, then the Court had the authority to impose the punishment incident thereto. The fact that Jerome S. Mann was thereafter acquitted by a jury cannot, we submit, affect the question of the guilt or innocence of Pattison; and, in this connection, we quote the following from the case of Goins vs. State, 46 Idaho St. 457; 21 N. E. 476, cited, with approval, by this Court in the case of Rooney vs. United States, 204 Fed. Rep. 928:

> "The circumstance that the principal offender, through failure of proof or caprice of the jury, had been convicted of a lower grade or even acquitted before the aider or abettor was put on trial cannot affect the question of the guilt or innocence of the latter. The degree of the guilt of the aider and abettor, as well as the question whether he is guilty at all, is to be determined solely by the evidence in the case."

Furthermore, it will be observed that, following the trial and acquittal of Mann, the Plaintiff in Error did not request the Court for leave to withdraw his plea of guilty, but, on the contrary, appeared at the time fixed for passing sentence and

heard the Court pronounce judgment upon him, thus, as it were, doubly confirming the truth of the charges contained in the indictment. No one could possibly know better than Pattison himself the truth or falsity of the facts set out in the indictment. As aptly suggested by the Trial Judge in disposing of this question in the Court below, there may have been many reasons why Mann was acquitted. It may have been due to the failure of the Government to prove any material allegation of the indictment, as, for instance, venue. Or, as stated by the Court in the case of Goins vs. State (supra), his acquittal may have been due to a misconception of duty on the part of the jury.

While it is conceded that the facts in the Rooney case differ substantially from those in the case at bar, yet the principles there considered appear to be very much in point, and we are quite willing to submit the question here for determination on the principles of law applicable thereto, as we find them annunciated in that case and the authorities cited therein, and as further illuminated by the well considered decision of District Judge Holland in the Hillegass case.

Respectfully submitted,

JOHN S. COKE,
United States Attorney for the District of Oregon.
J. O. STEARNS, Jr.,
Assistant United States Attorney for the District of Oregon.
For Defendant in Error.
ALFRED P. DOBSON,
JOHN G. BECKMAN,
Attorneys for Plaintiff in Error.

No. 4308

United States
Circuit Court of Appeals
For the Ninth Circuit. 9

CHRISTINA M. HOEFFNER, as Administratrix of the Estate of John H. Hoeffner, deceased,

Appellant,

vs.

NATIONAL STEAMSHIP COMPANY,

Appellee.

Apostles on Appeal.

Upon Appeal from the United States District Court fo the Southern District of California, Southern Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHRISTINA M. HOEFFNER, as Administratrix of the Estate of John H. Hoeffner, deceased,

Appellant,

vs.

NATIONAL STEAMSHIP COMPANY,

Appellee.

Apostles on Appeal.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Appellant:

MONAHAN & BEUM, ESQ.,

JOHN J. MONAHAN, ESQ., 212 West 6th St., San Pedro, California.

For Appellees:

JOE CRIDER, JR., ESQ., H. W. Hellman Building, Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION, IN ADMIRALTY.

CHRISTINA M. HOEFFNER, as Administratrix of the estate of JOHN H. HOEFFNER, deceased,	)	
Libellant,	)	LIBEL IN
vs.	)	PERSONAN.
NATIONAL STEAMSHIP COMPANY,	)	
Respondent.	)	

The libel of Christina M. Hoeffner, as administratrix of the estate of John H. Hoeffner, deceased, against National Steamship Company, now, or late owner of the Schooner or Vessel "Brunswick," in a cause of damages, civil and maritime, alleges, as follows:—

I.

That at all times, hereinafter mentioned, the Libellant was, and now is, a housewife, having her place of residence at San Pedro, California, and at the time hereinafter mentioned, the respondents were the owner of a Vessel or Schooner known as the "Brunswick." and that their residence is unknown.

II.

That during the month of April, 1922, the said Vessel "BRUNSWICK" was lying in the port of San Pedro, and was in need of unloading her cargo, consisting of lumber; that one John H. Hoeffner went on board and took up said employment, and at such

time, the said John H. Hoeffner, was employed by the master, or his agent thereof, to assist in the unloading of its cargo; that on the 15th day of April, 1922, while the said John H. Hoeffner was in said employment, and while he was engaged in making up slings of lumber so as to have them ready when the unloading should begin, the said Vessel got under way and proceeded up stream from the San Pedro Lumber Company's dock, in San Pedro Harbor, to which the Vessel had been moored, to Blinn's Lumber Dock, also in said Harbor of San Pedro; that while said John H. Hoeffner, was so engaged, and the ship was proceeding upstream as aforesaid, the sling yielded a little, so that he tripped and fell overboard; that there were no life lines or life rails on the side of said Vessel where the deceased was working, so that he could be protected; that the said Vessel negligently continued on her way after deceased was precipitated into the water, and she proceeded about five hundred (500) feet upstream before stopping; that no boat was lowered to pick up the deceased, and that there were no life buoys thrown and no effort was made, either by the master or crew of the said Vessel, to save the deceased; and that as a result thereof the deceased came to his death by drowning.

III.

That it was then and there, and at all times, the duty of the respondents to furnish, keep, and maintain a safe, sufficient and suitable place for said John H. Hoeffner to work in, and to perform said labor; to provide competent, capable and skillful seamen for the

manning of said Vessel, and to provide and maintain suitable, sufficient, and safe appliances for said seamen to perform their respective duties in the management and direction of said Vessel; and also with respects to the saving of men that are thrown overboard; but that disregarding their said duty in the premises and in this respect, the said respondents had knowingly, *carlessly,* and negligently failed to provide life rails or lines on that part of the deck where the said John H. Hoeffner was employed at the time of said accident, and had knowingly, *carlessly,* and negligently employed seamen who were not skillful in the manning and lowering of the life boat or the throwing out of life lines or life buoys for the rescuing of said John H. Hoeffner, and who were unskillful in the stopping of the vessel, or giving of signals for the stopping of vessels for the picking up and rescuing of said John H. Hoeffner; that said facts could not be known or determined by said John H. Hoeffner, from any inspection which he was permitted to make or was able to make before or at the time of performing said work, in the performance of which he lost his life, and the element of danger, resulting, or that might result from such conditions as aforesaid, was a latent and not an obvious danger.

IV.

That on the 25th dav of July, 1922, by the order of the Superior Court of the County of Los Angeles, in the State of California, duly given and made, the libellant was appointed administratrix of the estate of John H. Hoeffner, deceased, and letters of adminis-

tration on said estate were ordered to issue to Libellant upon qualifying; that the Libellant thereafter, duly qualified, as such administratrix, and thereupon letters of administration were issued to Libellant on the 25th day of July, 1922, and Libellant ever since has been, and now is, the duly qualified and acting administratrix of the estate of John H. Hoeffner, deceased.

V.

That said John H. Hoeffner, left him surviving as his only heir, Christina M. Hoeffner, his widow, who was dependent upon him for support, that before his decease the said John H. Hoeffner was able to secure continuous employment at his vocation as *lonshoreman,* as aforesaid, and received therefor the sum of $200.00 (Two hundred dollars) per month; that were it not by reason of said death, caused by said acts of said Respondents, said John H. Hoeffner would now be able to earn said sum of $200. (Two hundred dollars) per month, and that by reason of said death, caused by said acts of the Respondents, the Libellant, the said Christina M. Hoeffner, has been injured in the amount of $20,000.00 (Twenty thousand dollars)

VI

That said Vessel "BRUNSWICK" is now in the Harbor of San Pedro, California, and within the jurisdiction of this Honorable Court; that all and singular the premises *herin* are true and within the admiralty and maritime jurisdiction of the United States, and of this Honorable Court.

WHEREFORE, the Libellant prays that a monition according to the practices of this Court may issue

against the said National Steamship Company, and that it may be compelled to appear and answer upon oath all and singular the matters aforesaid, and if the said Respondents cannot be found, that an attachment may issue against his goods and chattels, and that this Honorable Court would be pleased to decree judgment of the damages aforesaid, with costs, and that the Libellant may have such other and further relief as she may be entitled to receive.

Monahan & Beum
Proctors for Libellant.

STATE OF CALIFORNIA)
) SS
County of Los Angeles)

I, CHRISTINA M. HOEFFNER, as administratrix of the estate of JOHN H. HOEFFNER deceased being first duly sworn, upon my oath depose and say: That I am Libellant in the above action; that I have read the foregoing Libel and know the contents thereof; that the same is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters that I believe to be true.

Christina M. Hoeffner

Subscribed and sworn to before me this
29 day of Aug 1922

J. E. Beum
Notary Public in and for the
County of Los Angeles State of
California

Aug 31, 1922 Let the Process of attachment issue as prayed for.

Trippett
Judge.
Trippet

[ENDORSED]: No. 1157 Adm. In The DISTRICT COURT OF THE UNITED STATES In the SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION, CHRISTINA M. HOEFFNER, as administratrix of the estate of JOHN H. HOEFFNER, deceased, Libellant VS NATIONAL STEAMSHIP COMPANY Respondent LIBEL IN PERSONAN. FILED AUG 29, 1922. CHAS. N. WILLIAMS, Clerk By W. J. Tufts MONAHAN & BEUM 212 W. Sixth St. SAN PEDRO, CALIFORNIA Phone 1166 J Attorneys for Libellant.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA IN ADMIRALTY

CHRISTINA M. HOEFFNER, as Administratrix, of the Estate of John H. Hoeffner, deceased. Libellant,	)	No. 1157
vs.	)	CLAIM OF NATIONAL
NATIONAL STEAMSHIP COMPANY, Respondent.	)	STEAMSHIP COMPANY.

And now before this Honorable Court appears National Steamship Company, owner of said ship "Bruns-

wick" her tackle, apparel, engines and her cargo and freight, by A. W. Donovan, its agent, and make claim to the said ship "Brunswick" her tackle, apparel, engines and her cargo and freight, and avers that it is now in the possession of the said ship "Brunswick" her tackle, apparel, engines and her cargo and freight, and that it is the true and bonafide owner of said ship "Brunswick" her tackle, apparel, engines and her cargo and freight, and that no other person or persons are the owner or owners thereof.

WHEREFOR it prays to defend the said suit accordingly.

NATIONAL STEAMSHIP COMPANY
By: A. W. Donovan
Agent

Joe Crider, Jr.
Clarence B. Runkle
Proctors for Claimant.

STATE OF CALIFORNIA,)
) SS.
COUNTY OF LOS ANGELES,)

A. W. Donovan, being first duly sworn deposes: That National Steamship Company, is the true and bonafide owner of the ship "Brunswick" her tackle, apparel, engines and her cargo and freight, against which this suit has been commenced by the said Christina M. Hoeffner, Libellant, and that no other person is the owner or owners thereof; that for the purposes of this suit deponent is agent of the said owner and is duly authorized by the said owner to put in this claim and deponent further says that at the time of

the commencement of this suit the said ship "Brunswick" her tackle, apparel, engines and her cargo and freight was in his possession, as agent, and that he is the lawful bailee thereof for the owner.

A. W. Donovan

Subscribed and sworn to before me
this 2nd day of September, 1922.

Clarence B. Runkle
Notary Public in and for the
County of Los Angeles,
State of California.
(SEAL)

[ENDORSED]: #1157-Adm. DISTRICT COURT OF THE UNITED STATES STATE OF CALIFORNIA COUNTY OF LOS ANGELES Christina M. Hoeffner, as Admrx. of the Estate of John H. Hoeffner, deceased, Libellant, vs. National Steamship Co., Respondent Claim. FILED SEP 2 1922. Chas. N. Williams CHAS. N. WILLIAMS, Clerk By ———————— Deputy Clerk JOE CRIDER, JR. Attorney-at-Law 333 H. W. Hellman Building, Cor. 4th & Spring Sts. Los Angeles, California Phone 61261

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
IN ADMIRALTY.

CHRISTINA M. HOEFFNER, as Administratrix of the Estate of John H. Hoeffner, deceased. Libellant,	No. 1157 - Adm.
vs.	RESPONDENT'S
NATIONAL STEAMSHIP COMPANY, Respondent.	CLAIM AND ANSWER

To the Honorable Benjamin F. Bledsoe, Judge of the District Court of the United States, in and for the Southern District of California:

The answer of National Steamship Company, owner of the ship "Brunswick" to the libel of Christina M. Hoeffner against the said ship "Brunswick", in a case of tort, civil and maritime, the said respondent alleges and propounds as follows:

I.

Allege that heretofore the National Steamship Company, duly filed with this Honorable Court its verified statement of claim to the said ship "Brunswick" her tackle, apparel, engines, and her cargo and freight, claiming that said National Steamship Company was and is the true and bona fide owner of said ship "Brunswick" her tackle, apparel, engines, and her cargo and freight, and that no other person or persons is or are the owner or owners thereof;

Allege that said claimant, National Steamship Company, was at all times mentioned in Libellant's libel,

the true and bona fide owner of said ship "Brunswick" her tackle, apparel, engines, and her cargo and freight, and that no other person or persons is or are the owner or owners thereof.

II.

Respondent has no knowledge as to the allegation that Libelant is a housewife having her place of residence, at San Pedro, and therefor requires proof of the same; Admits that at all times mentioned in the libel filed herein respondent was the owner of the vessel known as the "Brunswick".

III.

Admits that during the month of April, 1922, the said vessel, "Brunswick" was in the port of San Pedro unloading a cargo of lumber.

Respondent has no knowledge as to any of the remaining allegations in Paragraph II. of the libel herein and requires proof of the same.

IV.

Denies that respondent at any time or place, as alleged in said libel or at all, has disregarded its duty or duties in the matter of furnishing or keeping or maintaining a safe, or sufficient, or suitable place for said John H. Hoeffner, to work in, or its duty or duties to provide competent, or capable, or skillful seamen for the maintaining of said vessel, or its duty or duties to provide or maintain suitable, or sufficient, or safe appliances for said seamen or any of them to perform their respective duties in the maintenence or direction of said vessel, or with respect to the saving of men that are thrown overboard; Denies that re-

spondent carelessly or negligently failed to provide life rails or lines on any part of the deck of said vessel "Brunswick", or any part of said vessel where the said John H. Hoeffner was employed at the time of said accident, or at any other time, or that it carelessly or negligently employed any seamen or seaman who were not skillful in the maintaining or lowering of any life boat or life boats, or in the discharge of their duty of operating any life line or life lines or life buoy or life buoys, for the rescue of said John H. Hoeffner, or who were unskillful in the stopping of said vessel or giving signals for the stopping of *vesells* or any vessel for the picking up or rescuing of said John H. Hoeffner; Denies that said facts or any facts could not be found or determined by said John H. Hoeffner from any inspection which he was permitted to make or was able to make before or at the time of performing said work, or in any other manner; Denies that any danger which existed, if any, was not a patent or obvious danger.

V.

Respondent has no knowledge as to the allegations contained in Paragraph IV. of said libel and requires proof of the same.

VI.

Respondent has no knowledge as to the allegations contained in Paragraph V. of said libel and requires proof of the same; Denies that libelant has been injured or damaged in the sum of Twenty Thousand and no/100 ($20,000.00) Dollars, or in any other sum or at all, by reason of any negligence, recklessness, care-

lessness or unskillfullness on the part of respondent or any agent or servant of respondent or at all.

WHEREFORE respondent prays that this Honorable Court will pronounce against the demand of libelant in her libel above mentioned, with costs.

Joe Crider, Jr.
Clarence B. Runkle
Proctors for Claimant.

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

A. W. Donovan being by me first duly sworn, deposes and says: that he is the Agent for the Respondent in the above entitled action; that he has heard read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true. He makes this verification for and in behalf of respondent

A. W. Donovan

Subscribed and sworn to before me this)
2nd day of September, 1922)
)

Clarence B. Runkle
Notary Public in and for the County of
Los Angeles, State of California
(SEAL)

[ENDORSED]: No. 1157 - Adm. In The SUPEROR COURT OF THE STATE OF CALIFORNIA In and for the County of Los Angeles CHRISTINA M.

HOEFFNER, as Administratrix of the Estate of John H. Hoeffner, deceased. Libellant, vs. NATIONAL STEAMSHIP COMPANY, Respondent. ANSWER FILED SEP 2 1922 Chas. N. Williams CHAS. N. WILLIAMS, Clerk By———————————— Deputy Clerk JOE CRIDER, JR. Attorney At Law 333 H. W. Hellman Building, Cor. 4th & Spring Sts. Los Angeles, California Phone 61261 Attorney for

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IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION, IN ADMIRALTY

CHRISTINA M. HOEFFNER, as Administratrix of the estate of JOHN H. HOEFFNER, deceased. Libellant, Vs. NATIONAL STEAMSHIP COMPANY, Respondent.	AMENDMENT TO: LIBEL IN PERSONAN.

Upon leave duly had by the court herein:

The libellant amends, the libel in personam by adding thereto on page 3, on line 32, and at the end of paragraph V. the following to wit:

And as exemplary damages, the sum of $5000.00.

Monahan & Beum
Proctors for Libellants.

Dated December 8th, 1922.

STATE OF CALIFORNIA)
) SS
County of Los Angeles)

I, CHRISTINA M. HOEFFNER being first duly sworn, upon my oath depose and say: That I am libellant in the above action; that I have read the foregoing amendment and know the contents thereof; that the same is true of my own knowledge, except as to the matters which are therein stated upon my information or belief and as to those matters that I believe to be true.

Christina M. Hoeffner

Subscribed and sworn to before me this
8 day of December 1922.

J. E. Beum
Notary Public in and for the County
of Los Angeles, State of California
(SEAL)

[ENDORSED]: 12/14-1922 Motion Granted Stephen G. Long UNITED STATES COMMISSIONER No. 1157 In The DISTRICT COURT OF THE UNITED STATES IN THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION CHRISTINA M. HOEFFNER, at al. Libellant VS NATIONAL STEAMSHIP COMPANY Respondent. AMENDMENT TO: LIBEL IN PERSONAN. FILED DEC 14 1922 CHAS. N. WILLIAMS, Clerk By W. J. Tufts MONAHAN & BEUM 212 W. Sixth St. San Pedro, California Phone 1166 J Attorneys for———————

IN THE DISTRICT COURT OF THE UNITED STATES IN THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION, IN ADMIRALTY.

CHRISTINA M. HOEFFNER, as Administratrix of the Estate of JOHN H. HOEFFNER, Deceased Libellant. vs. NATIONAL STEAMSHIP COMPANY, Respondent.	)	No. 1157 Civil. COMMISSIONER'S REPORT.

To the Honorable, the Judges of the District Court of the United States, for the Southern District of California, Southern Division:

In pursuance to an order of reference, made in the above entitled matter by the Court, on the 6th day of November, 1922, transferring and referring said cause to me, the undersigned, for the purpose of taking testimony, making findings of fact, and recommending conclusions of law, and judgment and decree herein, and said cause, coming on before me to be heard in conformity with said order on the 27th day of November, 1922, and being thereafter duly and regularly continued by me until completed, and having been attended by the libellant, in person, and her proctor, John J. Monahan, and the respondent, having been represented by its proctor, Joe Crider, Jr., and having heard the testimony, both oral and documentary, produced on behalf of the libellant and respondent, re-

spectively, and having given careful consideration to the authorities cited in the briefs of proctors in behalf of the respective parties, and being fully advised in the premises, now report as follows:

FINDINGS OF FACT

I.

That on the 18th day of April, 1922, and all of the time thereafter, the libellant was, and is, a housewife, having her place of residence at San Pedro, California; and that on the 18th day of April, 1922, the respondent National Steamship Company was the owner of a lumber vessel called the "Brunswick".

II.

That on April 18, 1922, John H. Hoeffner, was employed by the Master of the lumber vessel "Brunswick" to assist in unloading the deck load of cargo lumber on board that vessel, then at San Pedro Lumber Company's dock, which is on the west side of the Inner Harbor, San Pedro, California; that at eight o'clock in the morning of that date, the "Brunswick" *case* off from that dock to go to the Blinn Lumber Company's dock on the east side of said Inner Harbor, but it was necessary for the said vessel to proceed in a northerly direction for a short distance so as to clear a dolphin to which the U. S. Government dredge was moored.

III.

That after the "Brunswick" cast off from the San Pedro Lumber Company's dock, as aforesaid, the first mate, who had charge of unloading the lumber cargo of that vessel, ordered the said John H. Hoeffner to

sling up the lumber, and in obedience to said orders, it was necessary for him to go on top of the lumber pile, stowed fore and aft, eight or nine feet high, and extended to the full width of that part of the ship and was flush with both sides thereof. The lashings of this lumber pile had previously been removed, and the top was a disordered mass of lumber; that said John H. Hoeffner, in company with his working partner, went on top of this lumber pile, the partner working inboard, and Hoeffner on the outboard side, it being necessary to start slinging from the extreme outboard part of the lumber, and immediately upon getting to his working position, and trying to pull the slings through on the extreme starboard side of the ship, the said John H. Hoeffner stepped on a plank, which tipped, and then stepping on another plank that tipped too, and precipitated him overboard, and he was drowned.

IV.

That there were no life lines, life rails, or other protection outboard of this lumber pile, which, while a vessel was under way in a narrow harbor, and being subject to pitch or roll from the wash of propellors of other vessels, or to the sudden jar of hitting or being hit by other vessels or obstructions, was a place dangerous to life and limb for those who were required to work thereon.

V.

That the said John H. Hoeffner was precipitated overboard a few minutes after the vessel "Brunswick" got under way, as aforesaid, and that the speed of

that vessel at that time was about two or three miles per hour; that the "Brunswick" did not immediately stop when the cry of "Man overboard" was raised; that no life boat was lowered, no life preserver, life buoy, or piece of lumber was thrown from the "Brunswick" to said John H. Hoeffner, after he was precipitated overboard, and while struggling in the water, and that no efficient efforts were made to rescue him by the Master, officers and crew of the said ship "Brunswick", and that the life boats and other life saving appliances of said ship "Brunswick" were not, at the time that said John H. Hoeffner was precipitated overboard therefrom, reasonably fit and accessible to effect his rescue, and that the Master, Officers and crew of said ship "Brunswick" were incompetent and culpably inefficient in the performance of their duties in matters pertaining to the handling of the ship and in the use of the ship's life saving appliances.

VI.

That said John H. Hoeffner was engaged in the work of longshoreman for about five months, and it does not appear from the evidence, how much of that time he was employed on board ships; that he had no means of ascertaining the condition of the lumber pile on which he was required to work until he got on top thereof, when he was immediately precipitated overboard; that he had no means of ascertaining the incompetency of the Master, Officers and Crew of said ship "Brunswick" in their duties with the condition, accessibility and use of the life saving appliances of said ship "Brunswick", and that the danger resulting,

or that might result from such conditions, as aforesaid, was a latent and not an obvious danger; that said John H. Hoeffner was not guilty of contributory negligence in the performance of his said work on board the said ship "Brunswick", and in no wise, while so employed, did he act otherwise than in a careful, cautious and prudent manner under the circumstances.

VII.

That said John H. Hoeffner, on the 18th day of April, 1922, and while in the employ of respondent on board said ship "Brunswick", came to his death by drowning in the Harbor of San Pedro, California; and that said death was caused by the failure of the respondent to furnish him with a safe and suitable place in which to perform said employment, and by the failure of the respondent to provide and maintain, in a reasonably fit and accessible condition, proper and efficient life saving appliances on board said ship "Brunswick", and in the failure of the respondent to provide and maintain Master, officers and crew competent and efficient in the handling of said ship "Brunswick" and in the stowage, accessibility and use of life saving appliances thereof.

VIII.

That said John H. Hoeffner, left *surving* him as his only heir, Christina M. Hoeffner, his widow; and that said Christina M. Hoeffner was dependent upon him for support and maintenance.

IX.

That on the 25th day of July, 1922, by the order of the Supeior Court of the County of Los Angeles,

in the State of California, duly given and made, the libellant was appointed administratrix of the Estate of John H. Hoeffner, deceased, and letters of administration on said Estate were ordered to issue to libellant upon qualifying, and that the libellant thereafter qualified as such administratrix, and letters of administration were issued to libellant on the 25th day of July, 1922, and libellant ever since has been and now is the duly qualified administratrix of the Estate of John H. Hoeffner, deceased.

X.

That before his decease, the said John H. Hoeffner, was a man of fine physique, and in excellent health, was continuously employed, and was earning and giving to his said wife, Christina M. Hoeffner, an average weekly wages of fifty-five ($55.00) Dollars; that said John H. Hoeffner, was, at the time of his death, of the age of 37 years, and that his life's expectancy was 30.35 years; that the libellant has suffered injury by the death of said John H. Hoeffner in the sum of Fourteen Thousand Four Hundred ($14,400.00) Dollars, as compensatory damages, and by reason of the reckless indifference to the rights and safety of the said John H. Hoeffner by the respondent, as aforesaid, the further sum of One Thousand ($1,000.00) Dollars, as exemplary or punitive damages.

XI.

CONCLUSIONS OF LAW.

As conclusions of law, from the foregoing findings of fact, I find that the libellant, Christina M. Hoeffner,

as Administratrix of the Estate of John H. Hoeffner, deceased, is entitled to recover from the respondent, National Steamship Company, the sum of Fifteen Thousand Four Hundred ($15,400.00) Dollars, and I recommend that judgment and decree be given to the libellant, Christina M. Hoeffner, as administratrix of the Estate of John H. Hoeffner, deceased, against the respondent, National Steamship Company, in the sum of Fifteen Thousand Four Hundred, ($15,400.00). In arriving at the foregoing conclusion, I have carefully considered the authorities cited in the briefs filed by the proctors for the respective parties herein, all of which is respectfully submitted.

Stephen G. Long
United States Commissioner.
(SEAL)

Dated February 26, 1923.

[ENDORSED]: No. 1157 Civil In The DISTRICT COURT of The UNITED STATES IN THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION Christina M. Hoeffner, as Administratrix of the Estate of John H. Hoeffner, Deceased, Libellant, vs National Steamship Company, Respondent. Commissioner's Report FILED FEB 26 1923 CHAS. N. WILLIAMS, Clerk By R. S. Zimmerman MONAHAN & BEUM 212 W. Sixth St. San Pedro, California Phone 1166 J Attorneys for *Respondent.*

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION, (IN ADMIRALTY.)

CHRISTINA M. HOEFFNER, as Administratrix of the Estate of John H. Hoeffner, deceased, Libelant, vs NATIONAL STEAMSHIP COMPANY, Respondent	No. 1157 AFFIDAVIT OF SERVICE OF EXCEPTIONS TO COMMISSIONER'S REPORT BY MAIL.

. . . . . .

STATE OF CALIFORNIA,)
) SS.
COUNTY OF LOS ANGELES,)

Joe Crider, Jr. being first duly sworn deposes and says:

That he is an attorney at law licensed to practice in the State of California; that he resides and has his office in the City of Los Angeles, County of Los Angeles, State of California:

That he is proctor for Respondent in the above entitled action;

That Monahan & Beum, attorneys at law, are attorneys for Libellant in this action and have their offices in the City of San Pedro, County of Los Angeles, at 212 W. 6th St. of said city:

That there is a regular daily communication by mail between said cities;

That on March 10, 1923, affiant deposited a copy of the attached exceptions to Commissioner's Report in the post office at Los Angeles, California, in a sealed envelope with postage prepaid and that said envelope was addressed to Messrs. Monahan & Beum, 212 W. 6th St. San Pedro, California.

Joe Crider, Jr.

Subscribed and sworn
to before me this 10th day
of March, 1923.

I. C. Swain
Notary Public in and for the
County of Los Angeles, State
of California

(SEAL)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. (IN ADMIRALTY.)

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CHRISTINA M. HOEFFNER, as Administratrix of the Estate of John H. Hoeffner, deceased.

Libelant,

vs

NATIONAL STEAMSHIP COMPANY,

Respondent.

No. 1157.

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Respondent hereby excepts to the Commissioner's report, findings of fact and conclusions of law on file

herein, upon the following grounds, and each of them, to-wit:

I.

That the evidence is insufficient to support the findings of the Commissioner contained in paragraph III of said findings, as follows: "The first mate who had charge of unloading the lumber cargo of that vessel ordered the said John *F.* Hoeffner to sling up the lumber, and in obedience to said orders it was necessary for him to go on top of the lumber pile, stowed fore and aft 8 or 10 feet high or extended to the full width of that part of the ship and was flush with both sides thereof. The lashings of this lumber pile had previously been removed and the top was a disordered mass of lumber."

II.

That the evidence is insufficient to support finding IV: "That there was no life lines, life rails or other protection out-board of this lumber pile, which, while a vessel was under way in a narrow harbor and being subject to pitch or roll from the wash or propellors of other vessels or to the sudden jar of hitting or being hit by other vessels or obstructions, was a place dangerous to life and limb for those who were required to work thereon."

III.

That the evidence is insufficient to support finding V, that portion reading as follows: "that the Brunswick did not immediately stop when the cry 'man overboard' was raised; that no life boat was lowered, no life preserver, no life buoy was thrown from the

Brunswick to the said John H. Hoeffner after he was precipitated overboard, and while struggling in the water, and that no efficient efforts were made to rescue him by the master, officers and crew of said ship Brunswick, and that the life boats and other life saving appliances of said ship Brunswick were not, at the time that said John H. Hoeffner was precipitated overboard therefrom, reasonably fit and accessible to effect his rescue, and that the master, officers and crew of said ship Brunswick were incompetent, and palpably inefficient in the performance of their duties in matters pertaining to the handling of the ship and in the use of the ship's life saving appliances.

IV.

That the evidence is insufficient to support that portion of finding VI, reading as follows: "That he had no means of ascertaining the condition of the lumber pile, on which he was required to work until he got on top thereof, when he was immediately precipitated overboard. That he had no means of ascertaining the incompetency of the master, officers and crew of said *said* Brunswick in their duties with the condition, accessibility and use of the life saving appliances of said ship Brunswick, and that the danger resulting or that might result from such condition as aforesaid was a latent and not an obvious danger. That said John H. Hoeffner was not guilty of contributory negligence in the performance of his said work on board the said ship Brunswick, and in no wise, while so employed, did he act otherwise than in a careful, cautious and prudent manner under the circumstances."

V.

That the evidence is insufficient to support that portion of finding VII, reading as follows: "That said John H. Hoeffner on the 18th day of April, 1922, and while in the employ of respondent on board of said ship Brunswick, came to his death by drowning in the harbor of San Pedro, California, and that said death was caused by the failure of the respondent to furnish him with a safe and suitable place in which to perform said employment, and that the failure of the respondent to provide and maintain in a reasonably fit and accessible condition proper and efficient life saving appliances on board said ship, Brunswick, and in the failure of the respondent to provide and maintain a master, officers and crew, competent and efficient in the handling of said ship Brunswick and in the stowage, accessibility and use of life saving appliances thereof."

VI.

There not being sufficient evidence to support the foregoing findings, it follows that the conclusions of law that Christina M. Hoeffner, as administratrix of the Estate of John H. Hoeffner, deceased, is entitled to recover from the respondent National Steamship Company, the sum of $15,400.00, is unwarranted.

VII.

That the said afore-mentioned findings of fact, nor any of them, are material to the issues as raised in the pleadings on file herein.

VIII.

That the Commissioners findings of fact and conclusions of law do not take into account the fact that the accident was inevitable and unavoidable.

IX.

That the Commissioners findings of fact and conclusions of law do not take into consideration and ignore the fact that deceased was guilty of contributory negligence, contributing directly and proximately to the accident and his death.

X.

That this Honorable Court does not have jurisdiction over the subject matter of this action or the parties thereto.

XI.

That there is insufficient evidence, and, in fact, no evidence whatever, to support the finding that punative or exemplary damages should be assessed against respondent.

These exceptions are based on the libel, plaintiff's answer, the entire files in the case, the transcript of testimony and excerpts from said transcript attached hereto and upon these exceptions.

Joe Crider, Jr.
Protector for Respondent

AUTHORITIES:

20 Ruling Case Law Sec. 12, Page 17
20 Ruling Case Law Sec. 14, Page 19
Flynn vs S.F. & J.R.R. 40 Cal. 14 at Page 19
Shearman & Redfield on the Law of Negligence 6th Edition Volume I, Sections 15 and 16, also Section 57, Page 122.

MEMORANDAM ACCOMPANYING EXCEPTIONS TO COMMISSIONER'S REPORT

THE LUMBER WAS NOT IN A DISORDERED MASS.

"A No, sir. The lashing was still on the lumber at the San Pedro Lumber Company's yard, most of it, I think there was two at the forward end of the dock that was taken off, right at this dock, San Pedro yard.

Q As a matter of fact, part of the cargo, the lumber cargo was unlashed?

A The biggest part of the deckload was lashed, on leaving San Pedro Lumber Company yard [Tr p3, 1s 22-26; p4, 1s 1-3]

Q This man was on a sling on top of this lumber?

A Yes, he was building up a sling, him and his partner.

Q Did you see him working on this lumber?

A Yes, I saw him working on that lumber.

Q Who fixed the sling for him, who arranged his sling load of lumber?

A Two of them was working there, two men was working putting the sling around.

Q And he was one of the two?

A Yes, he was one of the two men. [Tr p51 1s 20-26; p52 1s 1-3]

A His partner, the man working with the deceased, he had the sling after they piled this load and put it underneath, and the man, in order to get this load, he had to go on top of this load.

Q You mean Mr. Hoeffner got on top?

A Yes, on top here.

"Q And threw the sling there?

A Yes. The top plank of it was laying in a shape like this. It wasn't exactly straight with the others, consequently when he stepped on it, it tipped.

Q It tipped?

A Yes. The first time I noticed it it was shaking when he stepped on it the first time. The second time it over-balanced. He had the sling and was trying to take it towards the middle of the load.

Q He had this string pulling towards the middle of the load?

A Yes. And it tipped, he overbalanced while holding onto the thing, and him dragging that sling underneath till he came to where the big hook is." [Tr. p86 ls 19-26; p87, ls 1-12.]

"I went forward, and I got a sling, to the poop deck. There was some slings on the poop deck, that is, at the end of the lumber where the winchdriver and a man,— I forget whether the mast stands fore or aft— yes, it stands forward, the mast, I am pretty sure. And I unloosened one of these slings and took it down and stuck it under the lumber pile, the load we had already prepared. That is, it was prepared. We didn't prepare the loads. The loads were all prepared. That was laying on the top of the deck. I shoved the sling under and where the splice connects on the string, there was threads on that splice which was hard to get through; so he leans over the load and pulls it with his hand, and he gets it pretty near through. I said, 'We will pull the sling back to get it in the center of our

load.' Well, in doing so, he couldn't get it back. So he stood on top of his load, "exactly like that (illustrating), and he reached down to get hold of the sling and give a pull, and the board he was standing on turned, and he slipped right off back, that is, facing the ship with his back towards the water. At that time the winch-man, he hollered, 'Man overboard!'" [Tr. p104, ls 11-26; p105, ls 1-5,]

THE BOAT WAS STOPPED IMMEDIATELY.

"Q What did you do when you heard the cry 'Man overboard'?

A I stopped the boat immediately.

Q You stopped it?

A Yes, sir.

Q That is, you just stopped, rung the engine room alarm to stop the engine?

A Yes, sir." [tr p10, ls 9-15]

"Q Your machinery responded all right, did it, when you gave the orders?

A Yes, sir.

Q And all of the appliances were used in stopping the boat that possibly could have been used?

A Yes, sir." [Tr p20 ls 12-17]

"Q Did the boat stop immediately then?

A Yes; he stopped the boat.

Q In your experience as a sailor, based on this experience that you have testified to that you have had, is it possible to stop a boat immediately— I mean without it moving forward at all, after an order is given?

A No. If the boat has headway, making headway,

if you stop, especially if the vessel is loaded, see, she wouldn't stop right away.

Q If you slam on everything you have got, it won't stop immediately, will it?

A No.

MR. CRIDER: I think that is all." [Tr p 58 1s 5-17.]

"Q From your experience as chief engineer of that boat would you say, with your knowledge of its equipment and its engine, would you say it was stopped and backed as quickly as it could have been?

A Yes, sir." [Tr. p144, 1s 12-16]

THE CREW IMMEDIATELY STARTED TO LAUNCH A LIFE BOAT, BUT BEFORE IT COULD BE LAUNCHED TWO LAUNCHES, EQUIPPED WITH ENGINES AND A ROW BOAT, REACHED THE SCENE WHERE THE DROWNING MAN SANK.

"A Before I had a chance to turn the Brunswick around or to do anything of the kind to rescue the man there was a boat and two launches at the man already and when I got the head on the Brunswick, getting ready to get the boat ready to go to the man the man was already drowned." [Tr. p12, 1s 2-6]

"Q And you say that they were lowering a life boat, started to lower—

A They started to get one ready to lower.

Q Were there any other buoys thrown from any other boat or vessel to this man other than the one that was thrown from your vessel?

A The pilot boat coming up the bay, the man in charge of the pilot boat, he throwed a buoy on top of the man.

Q Where did that buoy that the man from the pilot boat threw, strike, with reference to the man who was in the water?

A He throwed it as near as he could possibly get.

Q And you say it lit on top of him?

A Just about, the man was at the time, when he seen it, the man was ready to sink, and he throwed this life ring as close to him as he could.

Q It struck on top of the man?

A Almost, as near as I could see. I was watching.

Q What you are talking about now, this life buoy the pilot man threw that struck on top of him, you saw that with your "own eyes, did you?

A Yes, sir." [Tr. p19 1s 16-26; p20, 1s 1-11]

"A Well, I throwed that life preserver as quick as I got up there.

Q After that, that was when the vessel stopped, was it?

A They were getting the boat ready but I didn't go to the boats because I was attending to the life preserver." [Tr p35, 1s 17-22.]

"A That was all I know— what happened. I had a life *preserved* and they were getting the life boats ready to go after this fellow and then there were two launches, one launch and that boat from the dredger. Then we sung out for them to get to this fellow. I was singing out like anything myself to draw attention of those fellows to come to this drowning fellow, and

this pilot boat, what they call it, I know it was a white painted boat, that was coming up the river and he got close to this man what got drowned and I don't know if he reached him. I didn't see him throw a life preserver but I think the man in the launch reached for the drowning man and he got his hat. [Tr. p36, 1s 1-12]

"Q When you saw him go down how many boats were there up around there, the immediate place where he went down?

A There was three boats.

Q What size were those boats?

A Well, there was one skiff there pulled by hand and two gasoline launches. [Tr. p53, 1s 21-26]

"Q Did you see any other boat or boats around the point where this man sank?" [Tr p88, 1s 25-26]

"A I did.

Q How many were there?

A There was one launch going along the pipe line towards the northern end. I was whistling to them and shouting and they didn't hear me. And there was a pilot launch, a white-painted launch, and a skiff.

Q Did those *launches* or boats come up to the place where the man sank?

A The pilot boat came first. The rest of them came later on.

Q Did you see any life buoys or lines thrown from any of those boats?

A One was thrown from the pilot boat.

Q You heard the cry 'Man overboard!' or you gave—

A I gave it myself.

Q What happened to your boat immediately after that cry? Did it stop or slacken speed?

A Yes—" [Tr p89, 1s 1-18]

"Q BY MR CRIDER : How long have you followed the sea?

A 25 years.

Q Have you seen life boats of the kind that were on the Brunswick, lowered?

A Yes, sir.

Q And you know how they were equipped at that time?

A Yes, sir.

Q Equipped as those life boats were, would it be possible to lower one of them instantly?

A No, sir.

Q They had been tied up there for some time, hadn't they?

A Well, we use that boat most every time in the Mendocina dock at Fort Bragg to get the lines out with.

"Q How long a time would it have taken to have lowered the life boat, that is, to detach it and everything and lower it?

MR. MONAHAN: Objected to as incompetent, irrelevant and immaterial.

THE COMMISSIONER: Objection overruled.

A . I should say a minute or two minutes, anyway. May be three." [Tr p143, 1s 5-26]

Q By that time the other boats were up there?

A That depends on where your men is at the time you want to lower them.

Q Of course, the men have to get up there?

A Yes, from their work.

Q In that period of time the other boats had drawn up?

A Yes." [Tr. p144, 1s 1-7]

"BY THE COMMISSIONER; What did they do towards lowering the boat?

A Took the lines loose that was holding her on the inboard side and where the lines are wrapped around the davits, got them loose and everything ready to hoist her up and throw her over.

Q But they didn't hoist her up?

A No, sir.

Q They didn't throw her out beyond the lines?

A No, sir.

Q They didn't raise her up at all?

A I don't think they did. I wouldn't say as to that, but they didn't move her out if they did.

Q How many men did you have working on the life boat at the time? Did you have all the men that were necessary to lower it?

Q BY THE COMMISSIONER: Then, when they saw there were three boats attempting to save the man, then the crew of the Brunswick did nothing further—and they stopped?

A Stopped and waited, yes, sir." [Tr. p148, 1s 2-26]

Q These other boats you saw come in rushing up there were manned by—

A —gasoline.

MR. MONAHAN: Not all.

Q Two of them were.

A Commonly called motorboats or gasoline boats.

Q And this man had sunk for the last time before they finished with their work they had started at lowering the life boats?

A Yes, sir, just about that time. When the man reached for him it was no use, because the boat was there." [Tr p150, 1s 1-9]

"A I know they were there to try to get the boat over. I know one man was there and the second mate. I see them, But who else was there at the time I can't state particularly. I know there were some more men there." [Tr. p159, 1s 3-8]

"Q You were working at the life boat, were you, there?

A Yes, sir.

Q Getting it ready to swing it overboard?

A Yes, getting it ready, getting the covers off, loosening up the covers.

Q What did you do to get that ready?

A I had to clear the halyards, the halyards are generally inside the boat and the cover on the life boat —see? And then we had to get, there is a fore and aft strong-back to "keep the cover in position. And I was working at that and the motor boats started to pull over towards the man so the boat would be there before we got our boat over." [Tr p163, 1s 6-19]

THE BRUNSWICK WAS EQUIPPED WITH LIFE BUOYS AND LIFE BOATS, AND ONE OF THE CREW IMMEDIATELY THREW A LIFE BUOY TO THE DROWNING MAN.

"Q BY MR. MONAHAN: Did you have any life buoys aboard?

A Yes, sir.

Q How were they rigged? What kind of life buoys did you have?

A Regulation life buoys." [Tr. p13-1s 13-17]

"Q How are they attached? Where were they attached to the side of the vessel?

A They are stuck in a canvas bracket, stuck right in a position so the man, all he can do is grab hold of the life buoy pull it and throw it overboard." [Tr. p14, 1s 4-8]

"Q Now, Captain, how many of these buoys did your vessel have on it on this date?

A Life buoys?

Q Yes.

A We had four.

Q Four of them. And how many life boats such as you have described? [Tr. p1-, 1s 8-15]

A Two."

"A Yes. I jumped on the house where the life boats were and four life buoys on the stern of the ship—

Q On the deckhouse?

A Yes, right hanging over the stern of the ship—

Q Hanging over the top rail?

A In a rack.

Q Rack?

"A Canvas— Call them 'suspenders' same as you put suspenders on. They were stuck in that.

Q You mean a strap?

A Strap, yes. And I got up there and one longshoreman says, 'Its a time to take this life preserver out,' but instead of lifting it out, he was pulling it this way, against the rail, and he couldn't get it out that way so I just got hold of this life preserver and threw it overboard. [Tr. p31, 13-26; p32, 1s 1-2]

"Q What life boat did you decide upon launching?

A The port life boat.

Q Did you have a life boat on the starboard side?

A Yes, sir." [Tr. p44, 1s 22-25]

"Q BY MR. MONAHAN: What kind of life boats did the Brunswick carry?

A Two wooden life boats.

Q Can you describe those life boats?

A Well, they are 20 feet long and about, I don't know, about 6—

Q 20 feet long. Can you give any further description of those life boats?

A Yes. 4 or 5 foot beam on them.

Q Beyond the dimensions can you give any further description of them so that if I went down I would know what class of boat to look for?

A The customary equipment, all equipment with air tanks.

Q Did you have a compass on the life boat?

A Yes." [Tr. p50, 1s 4-19.]

"Q I believe you say you saw one of the life preservers on the deck, did you?

A On the deck when I stepped out, when I came aft.

Q That life preserver was out of its sling, was it?

A Yes." [Tr. p54, ls 13-17]

"Q It wasn't in this sling or suspenders?

A No.

Q Was it laying on the deck?

A Yes.

Q What was its condition with regard to being wet or dry?

A It was wet." [Tr. p55, ls 1-6]

"Q Did you see the man in the pilot boat throw the life preserver?

A Yes." [Tr. p91, ls 24-26]

"Q Did you see any one throw a life buoy from the Brunswick?

A Yes. Charlie, a sailor, came by and a man was trying to get one out and Charlie came up and pulled it out and throwed it overboard.

Q What is that?" [Tr. p139, ls 19-25]

"Q How many life buoys were there on the boat?

A Four astern.

Q How many life boats?

A Two. [Tr. p143, ls 2-5]

THE CREW WAS THOROUGHLY EXPERIENCED AND EXCEEDINGLY EFFICIENT. ALL OF THE CREW HAD HAD MANY YEAR'S EXPERIENCE AT SEA.

"MR. MONAHAN: I am finished with the witness. You can have him. Excuse me, a minute. Captain, how long have you been at sea?

A About 32 years.

Q And on what class of vessels have you served previous to going on the Brunswick?

A Different classes of vessels, sailing and steam.

Q Sailing vessels, too?

A Yes.

Q What sailing vessels?

A Square rigged, fore and aft rigged vessels and steamers of different types and sizes.

Q How long ago since you served on square rigged vessels?

A I came out to San Francisco in a barkentine in 1898, the last square rigged vessel I been in." [Tr. p15, 1s 22-26; p16, 1s 1-11].

"Q BY MR. MONAHAN: What do you understand about navigation, Captain? Are you a practical navigator?

A I passed an examination to that effect.

Q I am glad you told me that. When did you pass this examination for master?

A About 12 years ago.

Q For what class of vessel have you got a master's certificate?

A I got a master's certificate for a steamer on any

ocean, an unlimited master's license." [Tr. p18, ls 19-26; Tr. p19, ls 1-2]

"Q Now, Captain, you have followed the sea continuously for how long, did you say?

A 32 years.

Q About 32 years. Now, with reference to the sailors that were on the Brunswick at this time, were they experienced sailors, if you know?

A Yes, sir.

Q Had you ever found any one of them to be incompetent?

A No, sir.

Q They had always performed their duties properly?

A Yes, sir.

Q You were familiar with your men, were you?

A Yes, sir." [Tr. p23, ls 15-26]

"Q How long have you been going to sea?

A I have been going to sea since I was 13 years old.

Q On what classes of vessels have you been going to sea on?

A Steamers and sailing vessels, square riggers.

Q Square rigged vessels?

A Yes.

Q How old are you?

A 42 years old.

Q And you have been going to sea since you were 13 on square rigged vessels and on steamers?

A Yes." [Tr. p33, ls 2-13]

"How long have you been going to sea?

A 25 years.

Q On what class of vessels?
A Sailing and steam." [Tr. p47, 1s 10-13]
"A I have been going to sea since 1902.
Q In the capacity of winchman?
A No. I was A. B." [Tr. p 82, 1s 7-9]

TO THE GRAVAMAN OF THE ACTION IN THIS CASE IS THAT THE BRUNSWICK WAS NOT EQUIPPED WITH LIFE BUOYS, LIFE LINES OR LIFE BOATS, AS REQUIRED BY LAW. AS A MATTER OF FACT, AT THE TRIAL OF THE CASE, PROCTOR FOR LIBELANT STIPULATED THAT THE BOAT WAS EQUIPPED WITH RAILS, LINES, LIFE BOATS AND LIFE BUOYS AS REQUIRED BY LAW.

"MR. CRIDER: As I understand it, Mr. Monahan is willing to stipulate that the United States inspectors made an inspection of this boat before the accident happened— it has been testified that that was in December, before this accident happened— and at that time the boat Brunswick was equipped with all necessary appliances, life buoys, life boats, guards, rails, lines, and so forth, as required by law and by the regulations in the Statutes of the United States. I understand you are willing to stipulate to that, Mr. *Monhana?*

MR. MONAHAN: Yes, I am willing to stipulate that at the last time she was inspected by the local inspectors, if she wasn't fully equipped, they would, in the performance of their duties, compel her to be so equipped; and we will assume that she was fully equipped at that time.

MR. CRIDER: Then your stipulation means that at that time she was equipped as required by law?

MR. MONAHAN: Yes; at the last inspection, whatever time that was. Well, I didn't say life rails. The local inspectors haven't anything to do with those. You can build a ship in any manner that you like.

MR. CRIDER: All right, then. Your stipulation covers life buoys, life boats—

MR. MONAHAN: And other equipment required by statute.

MR. CRIDER: Referring to the time immediately after the "accident, a day or so after the accident, an inquiry was held, and that it was so equipped at that time.

MR. MONAHAN: No. On mature deliberation, I cannot stipulate to that for this reason; the local inspectors have no authority to do anything beyond—or are you speaking about the equipment of the vessel at that time?

MR. CRIDER: Yes.

MR. MONAHAN: Yes. I will stipulate also the local inspectors found her fully equipped at some kind of an inspection they had after the subject-matter of this libel arose.

THE COMMISSIONER: Can you fix a date at which that inspection was made?

MR. MONAHAN: Sometime shortly after April 18 last.

MR. CRIDER: Within a day or so after, Mr. Monahan?

MR. MONAHAN: Yes. That she was fully equipped?

MR. CRIDER: Yes. I would also like to offer the findings of the United States local inspectors, that is, the findings giving the result of their investigation of this accident, which I have here.

MR. MONAHAN: I object to that on the ground the local inspectors have no judicial authority to inquire into anything beyond the equipment of the ship as provided for by statute, and that, it having been conceded the vessel was fully equipped, the subject-matter of their inquiry is entirely irrelevant and immaterial, and has no bearing on the issues here.

THE COMMISSIONER: I will sustain the objection as not being the best evidence. However, it may go into the record for the purpose of preserving the record on review.

MR. CRIDER: Your Honor, may I ask that the Reporter copy this, and let the gentleman have it back?

THE COMMISSIONER: It may be copied in the record.

MR. CRIDER: Mr. Reporter, will you copy this, please?

"(The following is the matter so requested to be copied:)

TRIPLICATE

File No. 981 S. I. G. No.

Report of Casualties and Violation of Steamboat Laws.

Name of Vessel	Brunswick-Freight steamer
Name of Officer	John E. Wahlgren, Master.
Local District	Los Angeles, Cal.

Date of Report May 8, 1922.
Date of Casulaty or Violation. April 18, 1922.
Nature of Casualty or Violation. Accidental drowning.
Action Taken Case investigated and dismissed.
Number of lives lost One
Form 924-A
Department of Commerce.
Steamboat-Inspection Service. 11-45-77

REMARKS:

While vessel was proceeding from dock at San Pedro to dock at East San Pedro about 8:05 a. m., John Hoeffner, an American, 38 years of age, married, who boarded the vessel to work as a longshoreman, accidentally fell overboard while engaged in pulling a sling around a load of lumber being prepared for discharging upon arrival at dock. Vessel was immediately stopped and crew made ready to launch lifeboat but was not considered necessary as two launches and a skiff, being in the vicinity, went to his assistance. A life buoy was thrown to him from one of the launches, which he did not grasp, and, being unable to swim, he disappeared before assistance could be given further.

The body was found some eight days later, and coroner's jury brought in a verdict of accidental drowning. Case was investigated on April 20 and May 6, 1922, on which latter date testimony was taken from those connected with the vessel which just arrived in port.

No blame was attached to any of the licensed officers of the vessel for the mishap, and the case was, therefore, dismissed.

(Signed) S. A. Kennedy, Jr.
Carl Lehners.
United States Local Inspectors."

[Tr. pages 170, 171, 172, down to and including line 19 on page 173.]

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[ENDORSED]: 1157 Civ IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. (IN ADMIRALTY.) CHRISTINA M. HOEFFNER, as Administratrix of the Estate of John H. Hoeffner, deceased, Libelant, vs NATIONAL STEAMSHIP COMPANY Respondent EXCEPTIONS TO COMMISSIONER'S REPORT, FINDINGS OF FACT AND CONCLUSIONS OF LAW.
FILED MAR 10 1923 CHAS. N. WILLIAMS, Clerk By L. J. Cordes, Deputy Clerk
JOE CRIDER, JR. Attorney-at-Law 333 H. W. Hellman Building Cor. 4th & Spring Sts. LOS ANGELES, CALIFORNIA Phone 61261

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

CHRISTINA M. HOEFFNER, as Administratrix of the Estate of John H. Hoeffner, deceased, Libelant, -vs- NATIONAL STEAMSHIP COMPANY, Respondent.	No. 1157 AFFIDAVIT OF SERVICE OF PETITION BY MAIL

STATE OF CALIFORNIA,)
) SS.
County of Los Angeles,)

Joe Crider, Jr. being first duly sworn, deposes and says:

That he is an attorney at law licensed to practice in the State of California; that he resides and has his office in the City of Los Angeles, County of Los Angeles, State of California; that he is attorney for Respondent in the above entitled action.

That Monahan & Beum, attorneys at law, are attorneys of record for Libelant in this action and have their offices in the City of San Pedro, County of Los Angeles, at 212 - 6th St. San Pedro, Cal;

That there is a regular daily communication by mail between said cities;

That on March 12th, 1923, affiant deposited a copy of the attached petition in the post office at Los Angeles, California, in a sealed envelope with postage prepaid and that said envelope was addressed to Messrs.

Monahan & Beum, attorneys at Law, 212-6th Street, San Pedro, California.

Joe Crider, Jr.

Subscribed and sworn to
before me this 12th day of
March, 1923.

Clarence B. Runkle
Notary Public in and for the
County of Los Angeles, State of
California

(SEAL)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

(Before Hon. S. G. Long, U. S. Commissioner.)

CHRISTINA M. HOEFFNER, as Administratrix of the Estate of John H. Hoeffner, Deceased.	)	No. 1157
Libelant,	)	PETITION FOR
-vs-	)	REHEARING
NATIONAL STEAMSHIP COMPANY,	)	AND RE-REFERENCE.
Respondent,	)	

. . . . . .

Comes now the respondent in the above entitled action and petitions this Honorable Court to grant a rehearing and re-reference for the purpose of taking further testimony.

This petition is based on Respondent's exceptions to the Commissioner's report filed herein by respondent

and will be based on affidavits of newly discovered witnesses, who were not available to respondent at the time testimony was taken before the Commissioner herein.

Dated March 12, 1923.

Respectfully submitted,

Joe Crider, Jr.

Proctor for Respondent

[ENDORSED]: No. 1157 IN THE DISTRICT COURT OF THE STATE OF CALIFORNIA SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION Christina M. Hoeffner, etc Libelant, -vs- National Steamship Co., Respondent PETITION FOR REHEARING AND REREFERENCE. FILED MAR 12 1923 CHAS. N. WILLIAMS, Clerk By W. J. Tufts, Deputy Clerk JOE CRIDER, JR Attorney-at-Law 333 H. W. Hellman Building, Cor. 4th & Spring Sts. Los Angeles, California Phone 61261 Attorney for respondent

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION, (IN ADMIRALTY).

CHRISTINA M. HOEFFNER, as Administratrix of the Estate of John H. Hoeffner, deceased, Libelant, vs. NATIONAL STEAMSHIP COMPANY, Respondent,	No. 1157, AFFIDAVIT OF MAILING.

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

JOE CRIDER, JR., being first duly sworn, deposes and says that he is an attorney at law licensed to practice in the State of California, that he resides and has his offices in the City of Los Angeles, County of Los Angeles, State of California, and he is proctor for the respondent in the above entitled action; that John J. *Moynihan,* attorney at law, is proctor of record for Libelant in the above entitled action and has his offices in the City of San Pedro, California, at 212 West 6th Street; that there is a regular daily communication by mail between said cities; that on March 28th, 1923, affiant deposited a copy of the attached amendment and addition to exceptance to Commissioner's report, findings of fact and conclusions of law, in the Post Office at Los Angeles, California, in a sealed envelope with postage prepaid and that said envelope was addressed

to John J. Monahan, Esq., Attorney at Law, 212 West 6th Street, San Pedro, California.

Joe Crider, Jr.

Subscribed and sworn to before
me this 28th day of March, 1923.
Clarence B. Runkle
Notary Public in and for the County
of Los Angeles, State of California.
(SEAL)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION, (IN ADMIRALTY).

CHRISTINA M. HOEFFNER, as Administratrix of the Estate of John H. Hoeffner, deceased, Libelant, vs. NATIONAL STEAMSHIP COMPANY, Respondent.	No. 1157, Amendment and Addition to Exceptions to Commissioner's Report, Findings of Fact and Conclusions of Law.

Respondent hereby files the following addition and amendment to its exceptions to Commissioner's Report, findings of fact and conclusions of law hereinbefore filed and in addition to said exceptions excepts to said report findings of fact and conclusions of law on the following grounds and each of them:

I.

That the findings of fact made by the Commissioner herein do not support the conclusions of law of said Commissioner and especially said conclusion as follows:

"First conclusions of law from the foregoing findings of fact I find that the Libelant, Christina M. Hoeffner as administratrix of the Estate of John H. Hoeffner is entitled to recover from the Respondent, National Steamship Company the sum of $15,400.00."

II.

That the judgment is excessive. These exceptions are based on the libel, plaintiff's answer, the entire file in the case, the transcript of testimony.

Joe Crider, Jr.
Proctor for Respondent.

Authorities in support of the *foreoing*:

Wagstaff vs. U.S. 281, Federal 877.
Hanrahn vs. Pacific Transport 262, Federal 951.
V. Osceola 189 U.S. 158.
The Pochassett 281, Federal 875.
Chelentis vs. Luckenbach 248, U.S. 372.
Burton vs. Greig, 271 Federal Reporter 271.
Petroline 271, Federal Reporter 273.
73 Federal 883
136 Federal 825
The City of Alexandria 17, Federal 390.
Olson vs. Navigation Co. 104, Fed. 574,
281 Federal 874.

(ENDORSED)
1157 Admiralty IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION (IN ADMIRALTY) CHRISTINA M.

HOEFFNER, as Administratrix of the Estate of John H. Hoeffner, decd. Libelant, -vs- National Steamship Co., Respondent. Amendment to Exceptions to Commissioners Report Findings and Conclusions FILED APR 2 1923 CHAS. N. WILLIAMS, Clerk By L. J. Cordes JOE CRIDER, JR. Attorney-at-Law 333 H. W. Hellman Building, Cor. 4th & Spring Sts. Los Angeles, California Phone 61261

At a stated term, towit: the July, A. D., 1923 Term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Tuesday, the thirteenth day of November, in the year of our Lord one thousand nine hundred and twenty-three;

Present:

The Honorable Benjamin F. Bledsoe, District Judge.

Christina M. Hoeffner, as Administratrix of the Estate of JOHN H. HOEFFNER, Deceased, Libellant	)	No. 1157 Civil Admiralty
vs.	)	
National Steamship Co. Respondent.	)	

This cause having been heretofore submitted on exceptions to United States Commissioner's report, it is by the court ordered that Opinion herein be filed, sustaining exceptions to the Commissioner's report and thereby re-referring the matter to the Commissioner

for a new hearing or for such other action as by the parties may be deemed appropriate.

At a stated term of the District Court of the United States, for the Southern District of California, held at the Court Rooms in the Federal Building, in the City of Los Angeles, State of California, on the——day of November, 1923.

Present – Honorable Benjamin F. Bledsoe, District Judge.

CHRISTINA M. HOEFFNER, as Administratrix of the Estate of JOHN H. HOEFFNER, Deceased, Libellant, vs NATIONAL STEAMSHIP COMPANY, Respondent.	No. 1157 CIVIL FINAL DECREE FOR RESPONDENT.

The above entitled matter, having, on the 6th day of November 1922, been referred to United States Commissioner Stephen G. Long, by stipulation of the parties, and in pursuance thereof, under an order of the Court directing him to take testimony, make findings of fact and recommend appropriate conclusions of Law, and Judgment and Decree, and said Commissioner, having heard the testimony adduced by the respective parties hereto, and having had the matter submitted to him for report in conformity with said order of reference, and the said Commissioner, having, on the 26 day of February 1923, made his report in writing, wherein and whereby certain findings of

fact were made, and as conclusions of law having recommended that the libellant recover of the respondent the sum of $14,400.00 compensatory damages, and $1,000.00 additional as exemplary damages, and the respondent, having, within the prescribed time filed his exceptions to said report, and the said exceptions having been argued and submitted to the court by the Proctors of the respective parties, and due deliberation having been had, and the Court having, on the 13th day of November, 1923, filed an opinion in words and figures, as follows:

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, IN ADMIRALTY.

CHRISTINA M. HOEFFNER, as Administratrix of the Estate of John H. Hoeffner, Deceased, Libellant,	)	No. 1157 Civil.
vs.	)	
NATIONAL STEAMSHIP COMPANY Respondent.	)	

John J. Monahan, Esq., of San Pedro, for Libellant,
Joe Crider, Jr., Esq., of Los Angeles, for Respondent,

MEMORANDUM OPINION.

BLEDSOE, District Judge:—

This case is before the Court upon exceptions to the Commissioner's Report. The Commissioner, having heard the case under an order of the Court directing him to take testimony, make findings of fact and recommend appropriate conclusions of law, and judg-

ment and decree, has made certain findings and as conclusions of law has recommended that the libellant recover of the respondent the sum of $14,400.00 compensatory damages and $1,000.00 additional as exemplary or punitive damages.

I have given the case very careful and earnest consideration and can arrive at no conclusion satisfactory to me other than that the judgment and recommendation of the Commissioner should not be confirmed by the court.

The suit was for a recovery for damages sustained by the libellant because of the death of her husband, referred to herein as the deceased, while engaged as a longshoreman in the unloading of the cargo or a portion thereof, of the schooner "Brunswick". It was alleged in the libel that while deceased was engaged in the performance of his duties and while the ship was proceeding upstream in the harbor at San Pedro, and while the deceased was engaged in making up slings of lumber so as to have them ready when the unloading of the vessel should begin, "the sling yielded a little so that he tripped and fell overboard; that there were no life lines or life rails on the side of said vessel where the deceased was working so that he could be protected; that the said vessel negligently continued on her way after the deceased was precipitated into the water, and she proceeded about five hundred feet upstream before stopping; that no boat was lowered to pick up the deceased and that there were no life buoys thrown and that no efforts were made either by the master or crew of the said vessel, to save the

deceased, and that as a result thereof the deceased came to his death by drowning."

The Commissioner's findings are not based apparently upon the allegations made in the libel, but proceed upon a different theory, probably a theory developed on the hearing. Seemingly this is not contrary to established principles of admiralty practice. The findings made by the Commissioner are to the effect that after the "Brunswick" case off from the San Pedro Lumber Company's dock, the first mate, having charge of the unloading of the lumber, ordered deceased to sling up the lumber, and in obedience to said orders it was necessary for him to go on top of the lumber pile. "The lashings of this lumber pile had previously been removed and the top was a disordered mass of lumber;" that deceased, in company with his working partner, went on top of the lumber pile, deceased being on the outboard side, it being necessary to start slinging from the outboard side, and that "immediately upon getting to his working position, and trying to pull the slings through on the extreme starboard side of the ship, the said John H. Hoeffner stepped on a plank, which tipped, and then stepping on another plank which tipped too and precipitated him overboard and he was drowned." That there were no life lines, life rails or other protection outboard of this lumber pile which, while a vessel was under way in a narrow harbor, and being subject to pitch or roll from the wash of propellors of other vessels, or to the sudden jar of hitting or being hit by other vessels or obstructions, was a dangerous place

to life and limb to those who were required to work thereon; that deceased was precipitated overboard a few minutes after the "Brunswick" got under way, the speed of the vessel at that time being about two or three miles per hour; that the vessel did not immediately stop when the cry of "Man overboard" was raised; "that no lifeboat was lowered, no life preserver, life buoy, or piece of lumber was thrown from the "Brunswick" to said John H. Hoeffner, after he was precipitated overboard, and was struggling in the water, and that no efficient efforts were made to rescue him, by the master, officers and crew of the said ship "Brunswick", and that the life boats and other life saving appliances of the said ship "Brunswick" were not, at the time that said John H. Hoeffner was precipitated overboard therefrom, reasonably fit and accessible to effect his rescue, and that the master, officers and crew of said ship "Brunswick" were incompetent and culpably inefficient in the performance of their duties in matters pertaining to the handling of the *sip* and in the use of the ship's life-saving appliances."

It is further found that deceased had been engaged in working as a longshoreman only a few months, that he had no means of ascertaining the condition of the lumber pile on which he was required to work until he got on top thereof, "when he was immediately precipitated overboard." That he had no means of ascertaining the incompetency of the master and crew of the vessel; that the danger confronting him was a latent and not an obvious danger; that he was not

guilty of contributory negligence, but acted in a careful, cautious and prudent manner. It is then further found that the deceased came to his death by drowning in the harbor of San Pedro while in the employ of the respondent on board the "Brunswick", "And that said death was caused by the failure of the respondent to furnish him with a safe and suitable place in which to perform said employment, and by the failure of the respondent to provide and maintain in a reasonably fit and accessible condition, proper and efficient life-saving appliances on board said ship "Brunswick", and in the failure of the respondent to provide and maintain master, officers and crew competent and efficient in the handling of said ship "Brunswick" and in the stowage, accessibility and use of life-saving appliances thereof."

It is obvious from a cursory inspection of these findings that some of them are immaterial in that they have no casual relation to the untimely death of the deceased. With respect to others, a careful study of the evidence impells me to the conclusion that they are unfounded and unjustified insofar as the evidence is concerned. For instance, it is not the fact, obviously, that deceased was precipitated overboard and into the water "immediately upon getting to his working position". The evidence of the partner of the deceased and of the winchman who stood on the top of the deckload, was to the effect that deceased and his partner had been working in the attempt to get the sling around a sling of lumber for at least several minutes. There is some conflict in the evidence as to whether

or not deceased and his partner actually laid the lumber for the sling upon which he was then working, one testifying one way and another another; but in any event, it is clear that the deceased had been, for some considerable time, that is, at least several minutes, on the top of the deckload before he fell therefrom.

The finding that there were no life lines, life rails or other protection outboard of the deckload of lumber, and that in consequence, because of the liability to pitching and rolling from the wash of the propellors of other vessels, or the sudden jar of hitting or being hit by other vessels or obstructions, the place was a dangerous one, is obviously irrelevant and untimely. There is no suggestion anywhere in the record that any wash was occasioned by any other vessel, and no suggestion anywhere that anything struck or was struck by the vessel on which the deceased was employed.

Counsel for libellant examined the captain and other members of the crew of the "Brunswick" as to certain matters of seamanship, and the like, which were wholly irrelevant to any inquiry pending before the Commissioner. From this examination, counsel himself being an expert seaman, it is sought to deduce the inference that the captain and the members of the crew were inexpert and as found by the Commissioner, "incompetent and culpably inefficient in the performance of their duties." It would make little difference how inexpert and incompetent the master and members of the crew were with respect to seamanship generally, if, at the time of the happening of the accident in

question, they acted with due promptitude and without any negligence on their part with respect to the *maters* and duties then devolving upon them. So, irrespective of the wide range of the examination conducted by counsel, the question really is, Did the master and members of the crew fail in any duty then immediately devolving upon them?

It is the fact that no life lines or life rails or other protection was placed around the top of the deck-load of lumber, but I cannot bring myself to believe that such circumstance is sufficient to charge respondent with liability. Deceased was sent to the top of the lumber pile in broad daylight, a little after eight o'clock in the morning. There is no suggestion from any source that he could not see perfectly what was up there, what he was expected to do, and the conditions under which he was called upon to perform the labor involved in the completion of his task. If, going up on the top of the lumber pile in the dark, with no opportunity to see or examine the conditions surrounding him, he had been precipitated overboard, a different question would be presented. I know of no rule of conduct, a violation of which would give rise to a charge of negligence, which says that where a man is called to a task in broad daylight, of the sort here under consideration, a railing must be built around him to protect him from falling off or overboard. The testimony in the case is that such rails were never put around the tops of deckloads of lumber, and there is nothing so inherently dangerous in the position as to suggest the necessity for a line or

rail. At best, the top of the deckload could not have been more than twelve or fifteen feet from the surface of the water; there was no unusual height calculated to disturb one's poise, and it seems clear to me that, conceding the place in which deceased had to work to be at all dangerous, the deceased, in accepting the employment, was called upon to exercise greater care because of the greater risk that was involved. It is not found that if a line or rail or other protection had been under, at, or near the top of the lumber pile, it would have prevented deceased from falling overboard. If one had been built and was reasonably necessary as a matter of duty devolving on the respondent, it would have had to have been lowered as the deckload was lowered in order to be a continuing protection to a worker on the top of the lumber pile. To me the situation is not at all dissimilar from that afforded by an everyday sight, the repairing of something contained beneath a manhole, at the top of which a man is stationed to assist the man below or to ward off travellers and the like. In a moment of inattention to his surroundings, the man thus employed steps into the manhole and is injured. With as great reason as that urged in the case at bar, it could be urged in such an instance, that some rail or protection should have been built around the manhole to protect the man who was watching it from falling into it.

Having full powers of observation, full opportunity to know and appreciate the dangers attendant upon the performance of his duties in the place in which he had to perform them, deceased was under the duty

of exercising a care and protection of himself in keeping with the situation in which he found himself. This he did not do, under the evidence, because from undisputed testimony he stepped, not once, but twice, upon a plank which was a part of the sling load he was trying to arrange, and the plank being placed slantwise across the block supporting the sling load, it turned or twisted, and the second time he stepped upon it, it turned sufficiently to cause him to lose his balance and he fell into the bay. One of the witnesses testifies that he saw deceased step upon this plank twice; that the first time he did so the witness felt that his procedure was unsafe and insecure; that is, he felt that the deceased was not exercising due and proper care, considering the place in which he was engaged. My own conclusion, therefore, from the evidence, is that deceased was precipitated into the water not because of any negligence of the respondent or any of its employees, but because of a want of care on the part of deceased himself, i. e., because of his own contributory negligence.

It is next asserted that no life preserver or piece of lumber or anything was thrown down to the deceased when he was in the water. This may be accepted as true in view of the Commissioner's findings, although there was some evidence to the effect that one of the life-buoys on the ship was actually thrown down into the water. There is no testimony in the case as to the direction or speed with which the water in the channel was moving, if at all. Apparently it must have been moving, because the deceased very rapidly

either swam, that is, "paddled", or drifted beyond the stern of the boat. The evidence to my mind establishes the fact that the captain stopped the vessel with all the celerity he could command, in view of all the circumstances. The vessel was heavily laden apparently, proceeding under power up the channel when the accident occurred. It is obvious it could not be stopped immediately, and an approaching vessel had to be taken into consideration. Counsel for libellant quotes at some length from the Rules of the Road respecting one vessel overtaking another, etc.; but it should be remembered that these rules where the vessels are proceeding normally, and that, obviously, the rules could not apply, at least in an unqualified degree, where one vessel, the one being overtaken, is compelled, because of some exigency arising, to change its normal course of procedure and either stop or turn around or the like. Under such circumstances, obviously, in a narrow channel like that at San Pedro, there was a duty devolving upon the master of the "Brunswick" to exercise care that he should not, in his endeavor to extend succor to the deceased, do that which would bring other lives or other property into danger. It should also be kept in mind that there were upon the water at that time two or three small craft, two of them power boats, and that these small craft, becoming apprised of deceased's fall into the water, were endeavoring to render him assistance. One of them, as a matter of fact, got so close to the deceased before he finally went down, as that those on board the "Brunswick" thought deceased actually

touched the craft—a pilot-boat. The person in charge of the pilot-boat threw a life preserved to the deceased, and those on the "Brunswick" observed, and there seems to be no controversy with respect to that, that this life-preserver landed very close to where the deceased was then being seen in the water. These circumstances,—the facts that others who were able to act more quickly than those upon the "Brunswick" because they possessed lighter and quicker moving craft, and that they were using every effort to render aid to the deceased, and were nearer to him than those upon the "Brunswick" were, should be taken into consideration in determining not only the duty devolving upon the men on the "Brunswick" but also in determining the adequacy of their efforts indulged in at the time.

If the deceased had fallen overboard in a large body of water, with no one in the vicinity save those on the "Brunswick", it could easily and very properly be claimed that a complete failure on their part to do anything in the way of endeavoring to rescue him would be chargeable as gross and indefensible negligence. However, under the conditions obtaining, with others nearer and better qualified to render assistance, the fact that the crew of the "Brunswick" did not do more than they did is satisfactorily explained.

The only finding in my judgment that is at all suggestive of a right to recover on the part of the libellant, is that in Paragraph Seven of the Commissioner's Report, to the effect that the death of the deceased was due to the "Failure of the respondent to provide

and maintain, in a reasonably fit and accessible condition, proper and efficient life-saving appliances on board said ship "Brunswick". If it could be said, by fair and reasonable inference, that deceased could have been saved if proper and efficient life saving appliances not on board the "Brunswick" had been there, and had been used with reasonable promptitude and efficiency by the officers and crew thereof, then, of course, there would be strong reason for supporting the conclusions arrived at by the Commissioner. It should be borne in mind, however, that it was stipulated in the case that the equipment required by law was on board the "Brunswick", and that such equipment was there at the time of the inspections by the United States Inspectors both prior to and subsequent to the accident. There is no suggestion from any source of any change in condition at the time of the accident, and it must be inferred, therefore, that all the equipment required by law was upon the Brunswick at the time of the occurrence in question. The captain testifies that the usual and proper life-boats and life-buoys were on board, and in their proper location. I see nothing in the testimony at all to justify a conclusion to the contrary. The reason why the life-boat was not launched is answered by what has been said hereinabIve. The mate and those in attendance upon it thought the others on the bay in the lighter craft would be able to reach the deceased and extend to him the aid of which he was then in need. With respect to the life-preservers, it is a question, as above referred to, whether one was thrown into the water or

not. The partner of the deceased, a longshoreman working with him, after deceased's fall into the bay, started to throw a life preserver to him. Obviously under all the testimony, though working upon it, due, perhaps to his excited state, he did not know how to remove it from its apparently appropriate receptacle. Instead of lifting it up, as he should have done, and merely breaking the twine which held it in place, apparently he was attempting to put it down through a fixed rack. This occupied some minutes. Before, however, he had succeeded in releasing the buoy, one of the sailors came running up, and without difficulty took it from its place. He says he threw it into the water as an aid to the deceased. Whether he did or not is a question, in view of the conflict in the evidence. Assuming that the life preserver was of the proper and appropriate sort, and that it could have been removed with reasonable promptitude, the fact that the partner of the deceased was engaged in attempting to remove it very likely deterred some of the sailors from going to it and throwing it overboard. Without doubt, it was thought that the partner of the deceased would do that which he was evidently trying to do, to-wit, throw out a life preserver to the deceased. It becoming apparent that he was not succeeding, one of the sailors went to his assistance with the result indicated above. It does not appear, however, anywhere in the evidence, that if reasonable celerity had been employed after the crew became apprised of the fact that deceased had fallen overboard, a life-buoy could have been thrown to him or in his direction,

which would have had any effect upon his rescue, or would have made it possible for him to avoid drowning. Of course, the proof need not be absolute with respect to this because in the absence of the actual occurrence, it would be impossible to say absolutely what would have resulted. But there is no testimony from which it might reasonably be inferred that if, exercising reasonable care and promptitude, a life preserver had been thrown to the deceased, he would or might have been enabled to take advantage of it and save his life.

The deceased having fallen overboard, due to his own negligence, no recovery should be had as against the respondent unless at least it should be proven to the degree required by the law, that the loss of his life thereafter was due to the neglect, want of care, and culpability of the servants of the respondent. I cannot believe the proof adduced suffices to establish this conclusion, and therefore am constrained to disaffirm the conclusions and recommendations reached by the Commissioner.

The above conclusions seem to be determinative of the matters involved, considering them in keeping with the theory of the case developed, and followed by the commissioner and the parties upon the hearing. If the rule contended for by respondent, as illustrated in Burton vs. Greig, 271 Fed. 271. be accepted, then there is still less ground for a decree in favor of libellant upon the facts as actually adduced.

The exceptions to the Commissioner's report are sustained, and the matter is re-referred to the Com-

missioner for a new hearing or for such other action as by the parties may be deemed appropriate. November 13th, 1923.

* * * * * * *

It is Ordered, Adjudged, and Decreed that the exceptions filed by the respondent to the report of the Commissioner herein be, and the same is hereby in all things sustained.

And it *xx* further appearing that the libellant has failed to take any further action in said matter,

It is now ORDERED, ADJUDGED AND DECREED by the Court that the libel filed in the cause be dismissed with ———— costs.

Done in open Court this 4 day of February, 1924.

Benjamin F. Bledsoe
United States District Judge.

Decree entered and recorded FEB 4 1924
CHAS. N. WILLIAMS, Clerk
By Edmund L. Smith, Deputy Clerk,

(ENDORSED)

No. 1157 Civil IN THE DISTRICT COURT OF THE UNITED STATES IN THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION CHRISTINA M. HOEFFNER, etc Libellant vs NATIONAL STEAMSHIP COMPANY Respondent. FINAL DECREE FOR RESPONDENT. FILED FEB 4 1924 CHAS. N. WILLIAMS, Clerk By Edmund L. Smith, Deputy Clerk JOHN J MONAHAN 212 W. Sixth St. San Pedro, California Phone 1166 J Attorneys for Libellant.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

(Before Hon. Stephen G. Long, U. S. Commissioner.)

CHRISTINA M. HOEFFNER, as Administratrix of the Estate of John H. Hoeffner, deceased, John H. Hoeffner, deceased, Libelant,	)	In Admiralty No. 1157.
vs.	)	
NATIONAL STEAMSHIP COMPANY, Respondent.	)	

REPORTER'S TRANSCRIPT OF TESTIMONY AND PROCEEDINGS.

APPEARANCES: For the Libelant: John J. Monahan, Esq., for Monahan & Beum;

For the Respondent: Jos. Crider, Jr., Esq.

Los Angeles, California, December 1, 1922.

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LIBELANT'S WITNESSES

LOS ANGELES, CALIFORNIA, DECEMBER 1, 1922. 10 A. M.

THE COMMISSIONER: Hoeffner against the National Steamship Company.

MR MONAHAN: The libelant is ready.

MR CRIDER: Ready.

THE COMMISSIONER: Is the usual stipulation entered into?

MR MONAHAN: Yes. We enter into the usual stipulation for Commissioner's fee and the Stenographer's fee. And, further, we would like to stipulate that either proctor may save exceptions to any action of the court without specifically mentioning it.

THE COMMISSIONER: I hardly think a stipulation is necessary because the report of the Commissioner is subject to exceptions.

(Testimony of John E. Wahlgren.)

MR CRIDER: I understand it is deemed that any objection, unless it is overruled, is excepted to.

MR MONAHAN: Yes, deemed excepted.

MR CRIDER: We may want to take a couple of depositions up north before you finally close this and I would like to have the opportunity to take them.

MR MONAHAN: That will be all right.

THE COMMISSIONER: All right: I would like a statement from each one of you so that I will be familiar with the issues.

(Opening statement by Mr Monahan.)

(Opening statement by Mr. Crider.)

THE COMMISSIONER: Did you file any exceptions to the libel?

MR MONAHAN: There are no exceptions filed.

MR CRIDER: No, simply an answer in denial of the things that are alleged in the libel.

MR MONAHAN: I will call the master of the vessel the first witness.

JOHN E. WAHLGREN,

a witness called on behalf of the libelant, being duly sworn, testified as follows:

Q BY THE COMMISSIONER: What is your name?

A John E. Wahlgren.

DIRECT EXAMINATION

BY MR MONAHAN:

Q Will you state your name, age, residence and occupation?

(Testimony of John E. Wahlgren.)

A Age 45, master mariner.

Q Your residence?

A 2230 Prince Street, Berkeley, California.

Q BY MR CRIDER: Have you got a phone?

A Yes, sir. It is Berkeley 7979-J.

Q BY MR MONAHAN: Were you the master of the lumber schooner, Brunswick, on April 15th last?

MR CRIDER: Was that the 15th or the 19th?

MR MONAHAN: April the 18th.

THE WITNESS: April the 18th, it is.

Q Were you master of the lumber schooner, Brunswick, on April 18th last?

A Yes, sir.

Q Where was the Brunswick at that time?

A In San Pedro harbor.

Q What time did you get in San Pedro harbor?

A About 7 a. m. in the morning.

Q Where did you go then?

A Docked at the San Pedro Lumber Company's yard.

Q What did you discharge at the San Pedro Lumber Company dock?

A We discharged tan bark, belonging to J. C. Hendry.

Q While at the San Pedro Lumber Company's dock was the lumber cargo unlashed?

A No, sir, it wasn't.

Q Eh?

A No, sir. The lashing was still on the lumber at the San Pedro Lumber Company's yard, most of it.

(Testimony of John E. Wahlgren.)

I think there was two at the forward end of the dock that was taken off, right at this dock, San Pedro yard.

Q As a matter of fact, part of the cargo, the lumber cargo was unlashed?

A The biggest part of the deckload was lashed, on leaving San Pedro Lumber Company yard.

Q Was John H. Hoeffner employed on the vessel under your command on the 18th of April last?

A Yes, sir, I presume he was. I didn't know the man at the time. He turned out to be the man.

Q When did you leave the San Pedro Lumber Company dock?

A Just as the 8 o'clock whistle blowed, or a few minutes after.

Q What is the length of the Brunswick below the water line?

A 162.

Q 162 feet. What is her beam?

A 34 beam, I believe.

Q What draught, light forward and light aft?

A She is about 5 feet something forward light, and about 14 feet aft.

Q What is the load line?

A The load line is about 16 feet 6 aft loaded, about 14 feet 9 to 15 feet forward. It all depends, according to the lumber.

Q What is the horsepower of the Brunswick?

A 500 horsepower.

Q 500 horsepower. What is her gross tonnage?

A 532.

(Testimony of John E. Wahlgren.)

Q 532. What is her net tonnage?

A 183.

Q 183?

A Or 283.

Q What kind of propellor have you got on the ship?

A At the present time we have got a—

Q At the present time? All my questions, Captain, will relate to the 18th of April last or just immediately before—

A The 18th day of April I think we had a cast iron wheel.

Q What is the pitch of the propellor blades?

A That is something I haven't very much knowledge about.

Q What kind of steering apparatus did you have on the vessel?

A Just an ordinary hand steering gear.

Q With a tiller or quadrant?

A There is a quadrant on it.

Q Were your wheel ropes crossed?

A I don't understand.

Q If you don't understand, all right. My question is, "Were the wheel ropes crossed?"

A The wheel ropes?

Q Yes.

A No. The wheel ropes is always in the same working order, condition—

Q I say were they crossed or straight? If you don't know, say you don't know.

MR CRIDER: The witness is entitled to know what the question is.

(Testimony of John E. Wahlgren.)

THE COMMISSIONER: Maybe he doesn't understand.

MR MONAHAN: I asked the question three times, were the wheel ropes crossed?

MR CRIDER: Maybe you can amplify your question a little more.

Q BY MR MONAHAN: Suppose you desire your vessel to go to starboard, what order would you give the helmsman?

A If I told him to put the wheel starboard?

Q What order would you give him?

A You mean if I want the vessel to go to starboard?

Q Yes; what order would you give him?

A I would tell him to put the wheel to port. That would throw the vessel to starboard.

Q What is that again?

A I don't understand you.

Q Suppose you desire to have the vessel go to starboard, what order would you give to the helmsman? Repeat the order.

A You want the vessel to swing to starboard?

Q To proceed to starboard—what order would you give him?

A You mean the vessel swinging to starboard—you would have to port your wheel to get the vessel to swing to starboard.

Q You would have to port your wheel to get your vessel to starboard?

A Yes, sir.

(Testimony of John E. Wahlgren.)

THE COMMISSIONER: Does that answer the question?

MR MONAHAN: That is very satisfactory to me, your Honor; very satisfactory.

Q What kind of life boat do you carry on the vessel?

A Wooden life boats.

Q Can you describe these boats any better than that?

A Not any better.

Q Were they Clinker or Carvel?

A I guess that is what—they are not Clinker.

Q Which were they?

A I presume Carvel, whatever you call it.

Q Have you got any other description or means of describing these vessels besides just "wooden boats"?

A No, sir.

Q W*h*ere they whale boats or square stern?

A Square stern.

Q Eh?

A Square stern.

Q Where did you carry, on the 18th of April last, where did you carry this life boat?

A Always in the same place where they are supposed to be carried.

Q And what is the same place? In a nest, cradle or on the davits—

A They are landed in chocks, what we call boat chocks, to keep from rolling over, and the davits, of

(Testimony of John E. Wahlgren.)

course, on each end of the boat with the tackle ready to be hoisted up.

Q You have secure gears, then, haven't you, turnbuckle secure gears to keep them from rolling?

A Just on the inside of the boat there is—

Q Haven't you got any turnbuckles? What keeps them from rolling inboard?

MR CRIDER: This seems to be immaterial.

THE COMMISSIONER: Overruled.

Q BY MR MONAHAN: What kind of boat ropes did you use?

A Manila rope.

Q What size manila?

A Three inch.

Q What is the length of the boat?

A I couldn't state. 20 feet something. They are up to the regulations of the United States Inspectors—

Q I am not asking you about the inspectors. What method did you use for getting the lifeboats out in case of emergency?

A Oh, he had the lashings to hoist the boat up and swing the davits out.

Q Swing the davits outward?

A Yes, sir.

Q What kind of blocks did you have, roller blocks?

A Wooden blocks.

Q I know, but what kind of hooks, just straight bill hooks or did you have a patent hook?

A On one side is a patent hook and on the other side it is a straight hook.

(Testimony of John E. Wahlgren.)

Q How long would it take from the time an emergency signal was given, an emergency alarm given, how long would it take to get the lifeboats in the water?

A Well, it all depends where the men would be at the time.

Q Now, you didn't see Mr. Hoeffner fall overboard, did you?

A No, sir.

Q When did you first learn that Mr. Hoeffner fell overboard?

A Somebody forward, there was somebody hollered there was a man overboard.

Q Who was that that raised the cry "Man overboard", do you remember?

A I don't remember. I think this gentleman sitting over there.

Q Which gentleman?

A There (indicating).

Q Where was he standing at the time?

MR CRIDER: What is that man's name?

A VOICE: Nagel.

Q Is this man you have reference to a member of the crew or a longshoreman?

A This man represents one of the crew.

Q He is a member of the crew?

A Yes, sir.

Q Or represents the crew, which?

A He is a member of the crew.

Q What did you do when you heard the cry "Man overboard"?

(Testimony of John E. Wahlgren.)

A I stopped the boat immediately.

Q You stopped it?

A Yes, sir.

Q That is, you stopped, rung the engine room alarm to stop the engine?

A Yes, sir.

Q Then what did you do?

A What did I do?

Q Yes.

A The first thing I done, I starboard the helm a little bit so the vessel would swing over so I could back the vessel because if I hadn't done so I would run her into a pipe line so I would have damaged the pipe line, and also a big steamer proceeding out at the time, I would have blocked the channel and it would be a case of collision. So the minute I seen I could back the vessel enough to stop headway on her I done so.

Q You just rung the engine room alarm, the indicator, to stop the ship, and put your helm to starboard?

A Yes.

Q Did she respond to your helm movement?

A Yes.

Q And she swung around to port?

A Yes, sir.

Q Swung around to port, over to the Kerckhoff Lumber dock?

A Yes, sir.

Q Then what did you do?

A I backed her full speed.

(Testimony of John E. Wahlgren.)

Q Backed her full speed?

A Yes.

Q Did she respond to the engine at that time? In other words, did she gather starboard?

A Not right away. It takes some time before a vessel will—

Q What speed were you making at the time the man fell overboard?

A Not very much speed. Just going slow.

Q Approximately how many knots were you going?

A I don't know. I couldn't state that.

Q Going a slow speed, though?

A Yes.

Q And how close to the deceased did you get with your ship in attempting to rescue him?

A Before I had a chance to turn the Brunswick around or to do anything of the kind to rescue the man there was a boat and two launches at the man already and when I got the head on the Brunswick, getting ready to get the boat ready to go to the man the man was already drowned.

Q Did you see the dolphin I had reference to in my opening statement, the dolphin to which the dredge was moored?

MR CRIDER: That assumes a fact not in evidence.

MR. MONAHAN: I asked him if he saw the dolphin.

MR CRIDER: It assumes there was one there. You simply stated that in your opening statement. I

(Testimony of John E. Wahlgren.)

haven't any objection to the question if it is properly framed.

Q Did you see the dredge and her scows?

A The dredge was in the channel working at the time.

Q What was the dredge moored to?

A Well now, that's easy to see what cable is out and see what mud pails is there but dredging—

Q Didn't she have a dolphin some distance north of her to which she was tied?

A No, sir. That dredger is moving back and forth all the time.

Q Did she have a dolphin to which she was tied and this dolphin was some distance north of the dredge?

MR CRIDER: If you know.

A Not that I remember.

Q Now, when you stopped, were you nearly abreast of the place you turn around for the Blinn Lumber Company, to come around to the Blinn Lumber yard?

A Not quite. About the middle of Kerckhoff's yard when I stopped the vessel.

Q Did you lower a lifeboat to rescue the man or have one lowered?

A No, sir. We were making one ready to lower.

MR CRIDER: What was that last?

THE REPORTER: (Reading) We were making one ready to lower.

Q BY MR MONAHAN: Did you have any life buoys aboard?

(Testimony of John E. Wahlgren.)

A Yes, sir.

Q How were they rigged? What kind of life buoys did you have?

A Regulation life buoys.

Q I want a better answer than that—regulation life buoys!

MR CRIDER: I presume, in seamen's terms, with which you are so familiar that means—

MR MONAHAN: I want to help you and help the court. There are several regulation kinds. There is the ring—

THE WITNESS: It is cork life rings, canvas outside.

Q What kind of line did you have attached to this ring?

A We have about a nine-thread manila, either nine or twelve, I couldn't state.

Q Nine or twelve-thread manila?

A Fifteen fathoms.

Q How are they attached? Where were they attached to the side of the vessel?

A They are stuck in a canvas bracket, stuck right in a position so the man, all he can do is grab hold of the life buoy, pull it and throw it overboard.

Q How were they attached on the 18th of April last?

MR CRIDER: I understood, Mr. Monahan, that all your questions referred to the 18th of April last. You made that statement and I believe the Captain understands it.

(Testimony of John E. Wahlgren.)

Q BY MR MONAHAN: Did you see the life buoys on the 18th of April last?

A Yes, sir.

Q Before this happened?

A Yes, sir.

Q And they were attached to the rail in the manner you have described?

A Yes, sir.

Q Were there any life buoys thrown to Mr Hoeffner when he was in the water?

A Yes, sir.

Q There were life buoys thrown?

A Yes, sir.

Q Who threw that life buoy?

A The sailor sitting right over there.

Q Which salior?

A VOICE: Me.

THE COMMISSIONER: What is his name?

A VOICE: Gibson.

Q BY MR MONAHAN: Where was the vessel when he threw this life buoy?

A I was backing the vessel to stop the headway, then he throwed the life buoy.

Q How far away was he from the life buoy—was the ship from the deceased?

A I couldn't state. I was on the bridge and couldn't see.

Q Did you see this man throw the life buoy?

A No, sir.

Q You didn't see him?

(Testimony of John E. Wahlgren.)

A No, sir.

Q Well now, I am asking you for facts within your own knowledge. Is all your testimony just alike?

MR CRIDER: I object to that question.

THE COMMISSIONER: The objection is sustained.

MR MONAHAN: I am finished with the witness. You can have him. Excuse me, a minute. Captain, how long have you been at sea?

A About 32 years.

Q And on what class of vessels have you served previous to going on the Brunswick?

A Different classes of vessels, sailing and steam.

Q Sailing vessels, too?

A Yes.

Q What sailing vessels?

A Square rigged, fore and aft rigged vessels and steamers of different types and sizes.

Q How long ago since you served on square rigged vessels?

A I came out to San Francisco in a barkentine in 1898, the last square rigged vessel I been in.

Q Is a barkentine a square rigged vessel?

A It is on the foremast

Q What kind of rigging secures the foremast to the barkentine?

A What kind of rigging?

Q Yes, to secure the foremast?

A The rigging is wire rigging.

Q What is this rigging called?

(Testimony of John E. Wahlgren.)

A There is backstays and stays of all kinds.

Q Anything else besides backstays to secure that mast?

A That's all.

Q That is, —

A And mainstays to lower—

Q I am talking about the foremast. The only secure you had to the foremast of this barkentine you were on were the backstays?

A Oh, no.

MR CRIDER: It seems to me this is incompetent what gear or rigging there was on a vessel in 1898.

MR MONAHAN: What rigging was on this vessel in 1898 is immaterial, but what this witness knows about handling a ship is material. That is the point we are getting to.

THE COMMISSIONER: I will sustain that objection.

MR MONAHAN: The issue here, may it please the Court, is this: Was this vessel seaworthy, was the Brunswick seaworthy on the 18th of April last?

MR CRIDER: But not some vessel in 1898.

MR MONAHAN: To determine whether the Brunswick was seaworthy on that day you have to determine equipment of the vessel and her officers and the competency of her officers and men, and that is the point I am reaching.

THE COMMISSIONER: I will sustain the objection but, for the purpose of preserving the record,

(Testimony of John E. Wahlgren.)

if you so desire, I will let the Captain answer the question.

Q BY MR MONAHAN: What standing rigging secured the foremast of the barkentine you referred to?

A Wire rigging. And they have particular names, and if you want—

MR MONAHAN: I want the Captain to answer my question. When I want further information I shall ask for it.

THE COMMISSIONER: He is answering it.

THE WITNESS: I say any particular name you want to know in regard to it, I can answer.

Q You answer my questions. What is this wire rigging? Can you further describe this wire rigging?

A I don't understand what you are asking.

Q Can you further describe what this wire rigging consists of? If you don't know, say so.

THE COMMISSIONER: If you don't understand his questions—

A I don't understand the question and I can't answer the man satisfactorily in that regard.

Q BY MR MONAHAN: I have asked what did this wire rigging consist of?

MR CRIDER: You are talking about a boat in 1898?

MR MONAHAN: Yes.

THE COMMISSIONER: You make the same objection?

(Testimony of John E. Wahlgren.)

MR CRIDER: Same objection.

THE COMMISSIONER: Same ruling. Let him answer the question for the purpose of preserving the record.

Q BY MR MONAHAN: What do you understand about navigation, Captain? Are you a practical navigator?

A I passed an examination to that effect.

Q I am glad you told me that. When did you pass this examination for master?

A About 12 years ago.

Q For what class of vessel have you got a master's certificate?

A I got a master's certificate for a steamer on any ocean, an unlimited master's license.

MR MONAHAN: That's all.

THE COMMISSIONER: Cross examine.

CROSS EXAMINATION

BY MR CRIDER:

Q Now, Captain, how many of these buoys did your vessel have on it on this date?

A Life buoys?

Q Yes.

A We had four.

Q Four of them. And how many life boats such as you have described?

A Two.

Q And you say that they were lowering a life boat, started to lower—

A They started to get one ready to lower.

(Testimony of John E. Wahlgren.)

Q Were there any other buoys thrown from any other boat or vessel to this man other than the one that was thrown from your vessel?

A The pilot boat coming up the bay, the man in charge of the pilot boat, he throwed a buoy on top of the man.

Q Where did that buoy that the man from the pilot boat threw, strike, with reference to the man who was in the water?

A He throwed it as near as he could possibly get.

Q And you say it lit on top of him?

A Just about, the man was at the time, when he seen it, the man was ready to sink, and he throwed this life ring as close to him as he could.

Q It struck on top of the man?

A Almost, as near as I could see. I was watching.

Q What you are talking about now, this life buoy the pilot man threw that struck on top of him, you saw that with your own eyes, did you?

A Yes, sir.

Q Your machinery responded all right, did it, when you gave the orders?

A Yes, sir.

Q And all of the appliances were used in stopping the boat that possibly could have been used?

A Yes, sir.

Q I am not up in technical seamanship like my friend, Mr. Monahan, but it is possible to just stop a boat like that—instantly?

(Testimony of John E. Wahlgren.)

MR MONAHAN: I object to that as calling for a conclusion of the witness.

MR. CRIDER: I think he is competent to answer.

THE COMMISSIONER: Objection overruled.

Q BY MR CRIDER: I mean it requires some little distance to stop a boat when you apply the machinery?

A Yes, sir.

MR MONAHAN: I would rather the proctor frame his questions in an interrogatory form and not make statements leaving the witness to confirm them.

THE COMMISSIONER: This is cross-examination.

MR MONAHAN: He is not asking questions; he is making statements.

MR CRIDER: I am asking leading questions. You saw fit to put the Captain on as your witness.

MR MONAHAN: There is no question about your asking leading questions. This is not a question at all.

THE COMMISSIONER: Objection overruled. Answer.

MR CRIDER: I believe you did answer.

A Yes, sir.

Q With reference to this lumber that was piled on the deck, Captain, how high was that piled up above the floor—I guess you would call it the deck?

A About 8 or 9 feet.

Q Pardon me if I don't use the proper technical terms, but let us suppose that this table here that we

(Testimony of John E. Wahlgren.)

are sitting at, suppose the top of that table is where the floor of the Brunswick deck is, then, it would be piled up about high above that?

A All depends. About 8 or 9 feet, I should judge, right forward.

Q As I understand it, this sling of lumber that Mr. Hoeffner was working with, was the sling itself on top of that pile of lumber?

A Yes, sir.

Q How big was the sling, Captain, the sling of lumber?

A Well, I didn't size it up. I should judge it was about, probably, 20 inches high, that he was trying to put the sling around.

Q Did you see him working with the sling on that batch of lumber?

A No, sir.

Q Now, you made some reference to a boat, a steamer, I believe, a big steamer coming from the opposite direction, and a pipe line.

MR MONAHAN: I don't remember that.

Q BY MR CRIDER: Now, Captain, have in your mind the direction in which the Brunswick was proceeding and just explain where this steamer was that to some extent interfered?

A The steamer was coming up the bay going in the same direction I was going.

Q On which side was it on?

A It was on the east side of San Pedro channel

(Testimony of John E. Wahlgren.)

more than I was. I was on the west side more and he was on the east side, proceeding up the bay.

Q Going in the same direction?

A Yes, sir.

Q Was it to your right or left?

A That is to my righthand side standing facing the bow of the vessel.

Q Where was this pipe line?

A Just placed about the middle of the channel between the San Pedro lumber yard and Blinn's yard.

Q On what side of you, in the direction you were proceeding, is the pipe line?

A The righthand side, the starboard side.

Q What kind of pipe line was that, Captain? Was it from the dredge or was it an oil pipe line?

A It is a dredge pipe line.

Q It was a string of pipe that run to this dredge?

A Yes.

Q Now, Captain, you have followed the sea continuously for how long, did you say?

A 32 years.

Q About 32 years. Now, with reference to the sailors that were on the Brunswick at this time, were they experienced sailors, if you know?

A Yes, sir.

Q Had you ever found any one of them to be incompetent?

A No, sir.

Q They had always performed their duties properly?

(Testimony of John E. Wahlgren.)

A Yes, sir.

Q You were familiar with your men, were you?

A Yes, sir.

Q As soon as you heard the cry of "Man overboard", you gave the order to stop?

A Yes, sir.

Q BY THE COMMISSIONER: What length of time elapsed between the time you heard the cry of "Man overboard" and the time your vessel was backing up?

A I guess about two or three minutes.

THE COMMISSIONER: That's all.

REDIRECT EXAMINATION

BY MR MONAHAN:

Q Captain, with reference to this steamer you testified as coming up on your starboard quarter, how far away from you was that steamer, just approximately?

A Well, I couldn't exactly, about 2000 feet probably—somewhere in that neighborhood.

Q That is satisfactory. And you found the dredge with her pipe line resting on mud scows on your starboard side?

A Yes, sir.

Q What was the distance between the Kerckhoff Lumber Company dock, that is, the San Pedro side, and this pipe line that you referred to, approximately —just about what distance?

A Approximately about 1,500 feet, somewhere in that neighborhood.

(Testimony of John E. Wahlgren.)

Q 1,500?

A Probably.

Q And the length of your vessel is 162 feet?

A Yes.

Q What is her speed?

A She goes about 9 knots an hour.

Q Do you know whether that man, the deceased, John H. Hoeffner was rescued, or whether he was drowned?

MR CRIDER: We will stipulate he drowned, Mr. Monahan.

MR MONAHAN: I am asking him.

A He drowned.

Q He was drowned?

A Yes.

Q Did you make any report of that fact?

A Yes, sir.

Q To whom?

A To the United States Inspectors.

Q To who?

A To the United States local inspectors in San Pedro.

Q The local inspector?

A Yes, sir.

Q Did you make your report to any other person about it?

A Yes, sir, the insurance company.

Q Did you make your report to any other government official about this thing?

A No, sir. That's all that is required.

(Testimony of John E. Wahlgren.)

Q You made no report to the United States collector, did you?

A No, sir.

Q What duty, if any, did you owe to the vessel who was overtaking you, according to inland rules of the road?

MR CRIDER: I think that is incompetent.

A That all depends.

THE COMMISSIONER: Overrule the objection. Answer the question.

Q BY MR MONAHAN: My question is susceptible of an answer. What duty, if any, did you owe to a vessel overtaking you when an emergency arose of a man overboard?

MR CRIDER: Just a moment; I don't understand you to claim that this big liner, this steamer you are talking about was overtaking him, do you?

MR MONAHAN: That's what you call a vessel coming up—overtaking.

MR CRIDER: Is that right?

A Yes, sir.

THE COMMISSIONER: They were going in the same direction?

A Yes.

THE COMMISSIONER: Was it ahead of you or to your stern?

A It was coming behind me.

MR CRIDER: I misunderstood it.

THE WITNESS: It all depends. If he gave me

(Testimony of John E. Wahlgren.)

a signal to pass me, I would have to answer the signal.

Q At 2000 yards?

MR CRIDER: Hold on; there is no testimony about 2000 yards.

Q BY MR MONAHAN: 2000 feet on your starboard quarter you have an emergency such as man overboard—I am asking now, what duty, if any, do you owe to that overtaking vessel?

A Well, in order to avoid a collision with him I would have to get out of the way for him, to not have a collision with him.

Q That is your answer, is it, Captain?

A Yes, sir.

Q And that is your conception of the inland rules of the road, is that right?

A He didn't—

Q Is that your conception of the application of the inland rules of the road—say yes or no.

A I wouldn't state for one way or the other because I don't understand what you are trying to get at. The man coming up behind me and giving me a signal to pass me, why—

Q We are not talking about a hypothetical case. I have asked a specific question.

THE COMMISSIONER: You asked him a hypothetical question.

MR MONAHAN: No. I asked him from the evidence in here.

MR CRIDER: No, pardon me.

(Testimony of John E. Wahlgren.)

THE COMMISSIONER: You stated a hypothetical question—you said if any emergency, with a man overboard, what duties do you owe a vessel overtaking you?

MR MONAHAN: Exactly. That question was susceptible of an answer. Instead of that he is going away on collateral issues entirely. He can answer the question any way he likes but let him answer it.

A In order to avoid having a collision at the same time I am trying to save this man I am not going to put my vessel in front of the steamer coming toward me and have him to run into my vessel.

THE COMMISSIONER: Are there any different rules of the road in cases of emergency like the present, other than the ordinary rules?

A No, sir.

MR MONAHAN: You say there is no difference between the ordinary rules and the inland rules of the road? You said no to that?

A I didn't answer no on that question.

THE COMMISSIONER: I didn't ask him that question.

MR MONAHAN: I would like to put this question to him again. Read the question.

THE REPORTER: (Reading) Are there any different rules of the road in cases of emergency like the present and the ordinary rules?

A Not that I know of. In a case of that kind—

MR CRIDER: What were you going to say? In case of that kind—what?

(Testimony of C. Gibson.)

A I say in a case of that kind, a man being overboard and a vessel—the way my vessel is fixed and the vessel coming up behind me, in a case of that kind, I don't know whether the rules call that—I can't block up the channel for that man coming behind me. If I did he would run into me.

Q BY MR CRIDER: Was he coming full speed?

A No, sir. Nobody can come up full speed in that channel.

Q BY MR CRIDER: Did you throw any lines in this case yourself, Captain? Did you throw any line overboard yourself?

A Not personally, no, sir.

THE COMMISSIONER: Is that all for this witness?

MR MONAHAN: Yes, that's all.

THE COMMISSIONER: Call your next witness.

C. GIBSON,

a witness called on behalf of the libelant, being duly sworn, testified as follows:

DIRECT EXAMINATION

Q BY THE COMMISSIONER: What is your name? ff

A C. Gibson.

BY MR MONAHAN:

Q State your name, age, residence and occupation?

A 42 years old. 1349 Pacific Street.

(Testimony of C. Gibson.)

Q You served on board the lumber schooner Brunswick on the 18th of April last?

A Yes, sir.

Q In what capacity?

A A. B.

Q Where did you ship?

A I shipped in the Brunswick in San Francisco. I think it was the 3rd of April. Wasn't that the time I shipped in the Brunswick, Captain—the 3rd of April?

THE COMMISSIONER: Just answer the questions.

THE WITNESS: I am not sure of that.

Q BY MR MONAHAN: Did you see John A. Hoeffner fall overboard from the Brunswick?

A No, sir.

Q. Just tell the court what you know about that case?

A Well, all I know about the case is I was aft. We just took the lines in and was going to move over to Blinn's and I was standing aft.

Q Which side?

A On the starboard side, aft, and I heard the fellows run up top and they were all looking outside and I looked over to see what it was and the fellow came floating by and he was paddling along this way, with his face—

MR MONAHAN: Indicating with his hands.

A (Continuing) And he was turned the other way. He was turned down the river, not the same way the Brunswick was going.

(Testimony of C. Gibson.)

Q Facing a southerly direction.

A Yes. I jumped on the house where the life boats were and four life buoys on the stern of the ship—

Q On the deckhouse?

A Yes, right hanging over the stern of the ship—

Q Hanging over the top rail?

A In a rack.

Q Rack?

A Canvas—call them "suspenders" same as you put suspenders on. They were stuck in that.

Q You mean a strap?

A Strap, yes. And I got up there and one longshoreman says, "Its a time to take this life preserver out", but instead of lifting it out, he was pulling it this way, against the rail, and he couldn't get it out that way so I just got hold of this life preserver and threw it overboard.

Q How far awav was the ship from this man at this time?

A Oh, well, the man was pretty well astern that time when I throwed this over.

Q What kind of line was attached to this life buoy?

A Just a common small manila rope as big your finger.

Q Describe it now. You are an A. B. Describe just what this line was?

A It is an ordinary manila rope, what we use for heaving line.

Q Can you give any better description of that line than that?

(Testimony of C. Gibson.)

A That's all you could describe it, about 15 feet long.

15 feet what?

A Or 15 fathoms.

Q That is the best description of the manila line you can give?

A That is attached to the buoy. And this line is also made fast to the rail of the ship so when you throw the line overboard she only goes so far and no further.

Q I should imagine so.

A Yes.

Q Now, you are sure you threw this life buoy overboard, are you?

A Yes, I am sure of that.

Q How long have you been going to sea?

A I have been going to sea since I was 13 years old.

Q On what classes of vessels have you been going to sea on?

A Steamers and sailing vessels, square riggers.

Q Square rigged vessels?

A Yes.

Q How old are you?

A 42 years old.

Q And you have been going to sea since you were 13 on square rigged vessels and on steamers?

A Yes.

Q And you are unable to describe a piece of manila line better than to say it was just so thick?

(Testimony of C. Gibson.)

A Well, you know what heaving line, manila rope is?

Q Yes. In what capacity have you been going to sea all this time?

A When I first went to sea I went as cabin boy.

Q That accounts for it. How fast was the ship going at the time you threw this life buoy overboard?

A The ship wasn't going very fast.

Q How fast was she going, about.

A Well, I guess she was making a couple of miles an hour.

Q When were you examined for A. B.?

A I never been examined for A. B.

Q All right. You can't tell just about how fast a vessel is going?

MR CRIDER: The witness has answered you.

THE WITNESS: I told you about two miles an hour.

Q BY MR MONAHAN: Two miles?

A I should guess about that.

Q Do you mean two miles an hour or two knots an hour?

A Well, call it knots. I call it miles.

Q You call it miles?

A Yes.

Q That is also satisfactory.

MR CRIDER: I am glad you are getting so many satisfactory answers.

Q BY MR MONAHAN: Did the vessel stop?

A Yes, sir.

(Testimony of C. Gibson.)

Q How far away from the man was she when she had stopped?

A When the vessel stopped, this fellow was quite aways astern.

Q Quite aways astern?

A Yes, quite aways astern before I got to throw him this buoy.

Q Approximately how far away was he at that time?

A Well, he was about, over 30 feet away, anyway.

Q With reference to the Kerckhoff lumber Company dock, where was the vessel—now, you remember the Kerckhoff Lumber Company dock—can you fix that place in your mind?

A I can fix the San Pedro yard. That is the place we were laying at and we just moved away from there.

Q There is another dock running along in the same direction upstream called the Kerckhoff Lumber Company dock?

MR CRIDER: I object to that kind of questioning. You are describing a place and telling him what it is and asking him what it is.

MR MONAHAN: I am trying to help him fix the locality. of the shore line. I want to ask him in relation to that shore line where was the vessel.

THE COMMISSIONER: What is the objection?

MR MONAHAN: Withdraw the question.

Q What happened after the vessel stopped, if anything?

(Testimony of C. Gibson.)

A What happened?

Q Yes.

A Well, I throwed that life preserver as quick as I got up there.

Q After that, that was when the vessel stopped, was it?

A They were getting the boat ready but I didn't go to the boats because I was attending to the life preserver.

Q What happened then?

MR CRIDER: Let him finish.

THE COMMISSIONER: What happened when the boat stopped? Go ahead.

A That was all I know—what happened. I had a life preserver and they were getting the life boats ready to go after this fellow and then there were two launches, one launch and that boat from the dredger. Then we sung out for them to get this follow. I was singing out like anything myself to draw attention of those fellows to come to this drowning fellow, and this pilot boat, what they call it, I know it was a white painted boat, that was coming up the river and he got close to this man what got drowned and I don't know if he reached him. I didn't see him throw a life preserver but I think the man in the launch reached for the drowning man and he got his hat.

Q BY MR MONAHAN: How far were you at that time from the man in the water?

A Well, we were quite a ways from him.

(Testimony of C. Gibson.)

Q Quite a ways?

A Yes. But I seen when this follow reached for him.

Q After that did the vessel get under way?

A She laid there quite a while before she got under way and went over to Blinn's.

Q She just went from where she was into Blinn's lumber Company yard?

A Well, she left from there, yes. She went over to Blinn's but not straight over. We had to go around a kind of a bend and around the dredger with the pontoons.

Q Did you see any dolphin there?

A No, sir.

Q You didn't see a dolphin?

A No, sir.

CROSS EXAMINATION

BY MR CRIDER:

Q Then, as I understand it, this pilot boat came right up to the very spot where the man was?

A Yes, sir.

Q And you saw somebody in that boat reach out and grab?

A Grab, yes. He got his hat.

Q He got the drowning man's hat?

A Yes.

Q Did you see that yourself, see him get his hat?

A Well, he came down and told the old man he just missed him, told that to the Captain, and he had the drowned man's hat in the launch.

(Testimony of C. Gibson.)

Q Now, when you heard this cry "Man overboard" and went to get this buoy to throw it over, did you saunter along leisurely or did you hurry?

A No, I never heard the cry of "Man overboard" because I was down on the poop in the stern of the ship. We were getting the lines for when we got to Blinn's to make the ship fast. I heard these fellows running forward along the house and I heard them and I looked out to see what was going on and I seen them all excited and looking outside, and I looked and see a man floating by and I knew a man was overboard.

Q When you saw this man overboard, knew he was overboard, then you went to get the buoy?

A Well, I ran up on the house. There was a longshoreman there trying to get the buoy.

Q When you went to get that buoy did you hurry or didn't you?

A Certainly I hurried right up.

Q You say you have followed the sea since you were 13?

A Yes.

Q Tell us what you have done since that time. How long were you a cabin boy?

A I was a cabin boy for about six months and always in a ship.

Q What did you do after that?

A Then I went as ordinary seaman.

Q Then what did you do after that?

A I been going to sea ever since.

(Testimony of C. Gibson.)

Q What seas have you sailed?

A Sailed in Europe, sailed out here, back east Russia, all over.

Q Been to sea constantly since that time?

A I have been making my living at the sea

Q That's all you have done?

A Yes.

Q You earned your living that way?

A Yes, sir.

Q You said there were four buoys up there?

A Yes, sir.

Q How many life boats were there on this Brunswick?

A There were two life boats on the Brunswick?

MR CRIDER: That's all. Mr. Monahan is putting these witnesses on but I understand if I want to call them as my witnesses I may.

THE COMMISSIONER: Oh, yes.

REDIRECT EXAMINATION

BY MR MONAHAN:

Q You say you have been following the sea since you were 13?

A Yes.

Q And that you served on square rigged vessels and steamers?

A Yes.

Q With the exception of the six months which you served as cabin boy, what kind of square rigged vessels did you serve on?

(Testimony of C. Gibson.)

A I was on barks, full rigged ships, schooners, barkentines.

Q What kind of standing rigging do you have in the foremast of this barkentine?

MR CRIDER: I offer the same objection.

MR LONG: The same ruling.

A The rigging of the ship? They are all the same. All ships got the same rigging.

MR CRIDER: Let His Honor rule.

THE COMMISSIONER: I will sustain the objection. However, if you think it is material and you want to put it in, he can answer the question for the purpose of the record.

MR MONAHAN: Go ahead.

A Well, they are pretty near all the same, only some of them have hemp lanyards, and instead of wire rigging they have hemp.

Q Of what does this standing rigging of the foremast of this barkentine consist of?

A The rigging of a barkentine?

Q The standing rigging of the foremast?

A Of a barkentine?

Q Yes.

A It makes no difference, barkentine, or full rigged ships—it is the same rigging.

Q Either one?

A It is wire, with stays.

Q That is the best description you can give of this rigging, is it?

(Testimony of K. Lind.)

A Well, what is it made of? It is made out of wire and some of hemp.

Q Is that the best description you can give of standing rigging? A. Yes. That's all I know what you call it—standing rigging.

Q The Captain just preceded you as a witness testified that the foremast was supported by backstays?

A Well, they have backstays and they have the rigging goes up that way. That's what I call the rigging of a ship.

MR MONAHAN: All right. That's all.

(Short recess.)

(After recess.)

K. LIND,

a witness called on behalf of the libelant, being first duly sworn, testified as follows:

Q BY THE COMMISSIONER: What is your name?

A K. Lind.

BY MR MONAHAN:

Q Will you please state your age, residence and occupation?

A 375 Manila Avenue, Oakland.

MR CRIDER: Got a 'phone there?

A Yes, Piedmont 6294-W.

Q BY MR MONAHAN: Were you serving on board the lumber schooner Brunswick on the 18th of April last?

(Testimony of K. Lind.)

A Yes, sir.

Q In what capacity?

A First mate.

Q Eh?

A As First mate.

Q What is your dutv as a First Mate regarding the loading and unloading of the vessel?

A Superintend the working, looking after the charge of loading, and unloading of the vessel.

Q Was John H. Hoeffner employed on the vessel on the 18th dav of April last?

A Yes, sir.

Q After leaving the San Pedro Lumber Company's docks or at any time, about 8 o'clock in the morning, did you give the deceased any orders?

A Yes, I gave him orders.

Q What orders did you give him?

A I gave him orders to, I told him to start to sling up the lumber, get the sling ready.

Q What time was this, about?

A Just about two or three minutes past eight.

Q Were you under way at that time?

A Yes, sir.

Q Did you have any railing around the part of the ship where the deceased was working or did you have life lines there?

A No, there was nothing at all there.

Q Just a flush deck?

A Flush deck.

(Testimony of K. Lind.)

Q That part of the deck was flush, no rail or bulwarks and no life lines?

A No.

Q Did you see the deceased fall overboard?

A No.

Q Did you hear the cry "Man overboard"?

A Yes.

Q What, if anything, was done by you at that time?

A When I heard the man holler I was turning my back to them and I heard a man on the forecastle holler "Man overboard". Then I went aft and I hollered to the captain. He was standing on the port side.

Q The port side of the bridge?

A The port side of the bridge. I said, "there's a man overboard" and I walked aft around on the port side to go after the life boat—

Q On the port side?

A Yes. I walked around to see the captain and then walked aft. I saw the man by that time, the man was pretty well astern and there was two boats there launched and the boat alongside the pipe line over there, and there was somebody was hollering to him about 100 feet or probably more from the man at that time to go and get him. They didn't seem to understand it right away, see? And I says, "Come on, we will get the boat ready, get them over." By that time them people launched two boats and they pull over to the man. When they was up to the man, pretty close to him, we consider well, he would be safe, any-

(Testimony of K. Lind.)

way, for the simple reason we didn't swing the boat overboard because he was right alongside of him.

Q What life boat did you decide upon launching?

A The port life boat.

Q Did you have a life boat on the starboard side?

A Yes, sir.

Q Where was that life boat?

A The life boat was in the rack, in the place where it belonged.

Q What do you call that place?

A We set the boat down and we have brackets on that and—

Q I am asking you what do you call that place where the life boat rests—what do you call that?

A Where the life boat rests?

Q Yes.

A A rack.

Q Was the life boat hanging to the davits?

A No.

Q Where was she then?

A Standing in the place.

Q What do you call that place?

A I call it a rack.

Q And you have that boat secured by two turnbuckles?

A We don't have any turnbuckles, regular clip trip hooks that slip over, just kick them off and the boat is loose.

Q What do you call that?

(Testimony of K. Lind.)

A Trip hooks. It has a link below that comes together and we just put the link over the two parts.

Q I know, what do you call that?

A Trip hooks.

Q That is the name you have for it?

A That is the name I generally use, yes.

Q Did you see anybody there throw a life preserver over?

A No, I didn't see it. I saw a life preserver laying on the deck when I came aft.

MR CRIDER: When you came what?

A When I came aft.

Q BY MR MONAHAN: A part of the lumber was unlashed at the time?

A Yes, part of the lumber was unlashed.

Q Eh?

A Yes, part was unlashed.

Q How many life buoys did the vessel carry?

A Four.

Q Where are those four, where are those four located?

A Four located right aft on top, around the top deck aft on the rail there.

Q Wouldn't that description fit anywhere from midship line to the taffrail that you just gave me?

A I beg your pardon?

Q Wouldn't that description you have just mentioned fit anywhere from midship line over to the taffrail?

(No response.)

(Testimony of K. Lind.)

Q Can you describe any better the location of the life buoys than what you have already done?

A Right aft of the top deck, right aft the stern. hanging over the stern.

Q What do you call that rail—have you got a rail around the stern?

A Yes.

Q What do you call that?

A Hand rail.

Q Is that the name of the rail you have around the stern of the vessel?

A Yes.

Q How long have you been going to sea?

A 25 years.

Q On what class of vessels?

A Sailing and steam.

Q. What class of sailing vessels and steam vessels?

A I been on schooners, square rigged.

Q What rig was the Brunswick?

A What rig?

Q Yes.

A One mast.

Q What is that mast called?

A Foremast.

Q What is the standing rigging for that mast? What kind of standing rigging have you got for that?

A Three stays standing rigging and then we have two hatch stays and two more stays.

Q What do you call them?

A Backstays.

(Testimony of K. Lind.)

Q How were those stays fitted over the masthead?

A On a slip over the masthead.

Q How were they fitted to the masthead?

A Two fore stays and two backstays going up around the mast.

Q How weere they fitted to the masthead?

A A band is fitted around the masthead and a shackle.

Q About these schooners you have been on, fore and aft rigged vessels, what kind of rigging did you have on the main mast of that vessel?

MR CRIDER: For the purpose of the record I make the same objection—incompetent, irrelevant and immaterial.

THE COMMISSIONER: Same ruling.

A There is a forestay.

Q The fore what?

A The forestay.

Q I mean the main mast.

A Backstays.

Q I mean the main mast.

A You mean the main mast on a barkentine?

Q Yes.

A There is backstays between the two masts, and there is the main rigging and backstays.

Q What do you call the main rigging?

A The main rigging is the main rigging.

Q Could you describe the main rigging any better than the main rigging?

(Testimony of K. Lind.)

MR CRIDER: This is entirely too general. What particular boat are you referring to?

MR MONAHAN: Any vessel. What vessel he likes, any barkentine he ever sailed on. Did you serve on a barkentine?

A Yes, sir.

Q Describe the rigging on the main mast of the last barkentine you served on.

MR CRIDER: Let's get what barkentine that was. These questions are too general.

Q BY MR MONAHAN: What was the name of the barkentine?

A G. C. Weiler.

Q Describe the standing rigging of the main mast of that barkentine?

A There is a spring stay and main rigging and the stays between the mainstay, between the masthead and the foremast, and then there is a stay we call a spring stay.

Q Well, we have got the spring stay. All right. What about the main rigging—what do you call that?

MR CRIDER: We have got a whole crew of a ship here and I certainly object to a continuation of these questions.

THE COMMISSIONER: I think you are wasting time, Mr. Monahan. I can't see the materiality of this.

MR MONAHAN: I can see it and account for it too. He may object. I can see the point I am after.

THE COMMISSIONER: Well, I will sustain the objection, but make it as brief as you can.

(Testimony of K. Lind.)

Q BY MR MONAHAN: What kind of life boats did the Brunswick carry?

A Two wooden life boats.

Q Can you describe those life boats?

A Well, they are 20 feet long and about, I don't know, about 6—

Q 20 feet long. Can you give any further description of those life boats?

A Yes. 4 or 5 foot beam on them.

Q Beyond the dimensions can you give any further description of them so that if I went down I would know what class of boat to look for?

A The customary equipment, all equipment with air tanks.

Q Did you have a compass on the life boat?

A Yes.

Q What make of compass?

A I don't know what make it is—Thompson.

Q What kind of compass did you have for the ship, the Brunswick herself?

A I have forgotten.

MR MONAHAN: That's all.

CROSS EXAMINATION

BY MR CRIDER:

Q Now, Mr. Lind, there was lumber piled on the deck of this boat, the Brunswick wasn't there, at the time this happened?

A Yes.

Q About how high up was that lumber from the floor of the deck?

(Testimony of K. Lind.)

A I guess right from the floor, I guess there was about 9 feet.

Q The lumber was piled so that the lumber extended up 9 feet?

A No. Yes, but a man that was working at that time, he was about 9 feet from the deck.

Q What I mean is this—let us suppose this table is the deck. The lumber extended about 9 feet?

A Yes, about 9 feet.

Q The lumber was piled all over the deck?

A Yes.

Q This man was on a sling on top of this lumber?

A Yes, he was building up a sling, him and his partner.

Q Did you see him working on this lumber?

A Yes, I saw him working on that lumber.

Q Who fixed the sling for him, who arranged his sling load of lumber?

A Two of them were working there, two men was working putting the sling around.

Q And he was one of the two?

A Yes, he was one of the two men.

Q Did you ever see any rails around a boat like this Brunswick that was hauling lumber where rails extended by the lumber?

A No.

MR MONAHAN: I object to that as incompetent, irrelevant and immaterial. I never referred nor expect a rail or life line to be that high.

(Testimony of K. Lind.)

THE COMMISSIONER: The objection will be overruled. Proceed.

Q BY MR CRIDER: On a lumber schooner with a flush deck like the Brunswick, they are not equipped with rails anyhow, are they?

MR MONAHAN: Same objection.

THE COMMISSIONER: Same ruling.

Q BY MR CRIDER: The question is, Mr Lind, let us suppose that this table was the deck of the Brunswick; what I want to know is, on lumber schooners with a flush deck like the Brunswick where they have lumber piled 9 or 10 feet high, they don't have a hand railing around the edge?

A Not on the edge of the deck load, no.

Q How long did you say you followed the sea?

A About 25 years.

Q 24?

A 25.

Q You followed the sea constantly during all that time?

A Yes.

Q What seas have you sailed?

A Sailed out to England and around here. I been around here for the last 18 or 20 years.

Q Up and down the coast here?

A Yes.

Q Never been on the other side?

A Yes, I was on the other side, too.

Q About how many boats have you worked on dur-

(Testimony of K. Lind.)

ing that time—I don't want you to say exactly how many but is it as many as five or as many as twenty?

A Well, it is as many as five, anyway.

Q Now, you saw this man in the water?

A Yes.

Q You saw him go down, did you?

A I saw him go down.

Q And noted that he did not come up any more?

A No, not that I saw.

Q When you saw him go down how many boats were there up around there, the immediate place where he went down?

A There was three boats.

Q What size were those boats?

A Well there was one skiff there pulled by hand and two gasoline launches.

Q Let's get the first one.

A A skiff.

Q You mean, that is rowed by oars?

A Yes, rowed by oars.

Q What was the next one?

A The next one was two gasoline launches.

Q Then what?

A That's all the boats.

Q As I understand it, those three boats, then, were scouting or cruising or running back and forth around this place where the man went down?

A Yes, they was right there.

Q I believe you say you saw one of the life preservers on the deck, did you?

(Testimony of K. Lind.)

A On the deck when I stepped out, when I came aft.

Q That life preserver was out of its sling, was it?

A Yes.

Q It wasn't in this sling or suspenders?

A No.

Q Was it laying on the deck?

A Yes.

Q What was its condition with regard to being wet or dry?

A It was wet.

Q Will you describe for the purpose of this record, in your seaman's language, just where was this sling on the deck that this man fell off of?

A He was working on the starboard side forward on the deck.

Q And can you describe it any more exactly than that, Mr. Witness, please—pardon me so I will give you an idea of what I mean. I don't understand seaman's terms, but if you were to ask me where those books are, I would tell you they were on the right side and at the extreme corner.

A Yes.

Q Describe it that way.

A On the extreme corner on the deck-load, extreme corner, way out.

Q Forward or aft?

A Forward.

Q Which side?

A On the right-hand side.

(Testimony of K. Lind.)

Q Near what part of the ship?

A The forward end.

Q The forward end of the deck-load?

A Yes, forward end of the deck-load.

Q How long had you been working on the Brunswick?

A Off and on for five years.

Q When were the government inspectors on your boat last before this accident happened?

MR. MONAHAN: Objected to as incompetent, irrelevant, and immaterial. There is a presumption before the court that the local inspectors will do their duty and have done it, and it has no particular bearing on this issue at all.

THE COMMISSIONER: I will overrule the objection. Exception.

Q BY MR. CRIDER: When were the government inspectors on the Brunswick last before this accident happened?

A The last before that accident, it is a year ago the 12th of December. That was the last inspection, wasn't it, Cap?

Q Just a moment: As far as you recollect.

A Yes; somewhere in the neighborhood of there.

Q It would be in the December before this April that this accident happened then, it would be a year last December and this accident happened April of this year. Do you mean a year ago this coming December?

A This coming December is a year.

(Testimony of K. Lind.)

Q This accident happened in April?

A Yes.

Q And it would be the December before that April?

A Yes, it would be from December to April.

MR. CRIDER: I want you to read what Mr. Monahan said just now.

THE REPORTER: "There is a presumption before the Court that the local inspectors will do their duty and have done it, and it has no particular bearing on this issue at all".

MR. CRIDER: You don't want to stipulate the equipment found by the inspector was satisfactory to you, do you?

MR. MONAHAN: No. It is immaterial to this question.

MR. CRIDER: It is immaterial to the question?

MR. MONAHAN: Yes.

THE COMMISSIONER: I would like you to explain to the Court why you were so particular to find out what the arrangement on the boat was and how the boat was equipped, and so on, if it is immaterial.

MR. MONAHAN: I will reserve that, with the Court's permission, to a later stage of this trial.

THE COMMISSIONER: I have permitted you to go into all that because I thought it was material.

MR. MONAHAN: I would be very glad to explain all of that at a later stage of the trial, very glad, and I will do it without any particular invitation at all. I will cheerfully do it.

Q BY MR. CRIDER: I forgot what you said

(Testimony of K. Lind.)

that first brought it to your attention that there was a man overboard. What did bring it to your attention first?

A A man on the forecastle head cried, "Man overboard".

Q What did you do then?

A I went right out and hollered to the Captain and said, "There is a man overboard; back up".

Q Did the boat stop immediately then?

A Yes; he stopped the boat.

Q In your experience as a sailor, based on this experience that you have testified to that you have had. is it possible to stop a boat immediately—I mean without it moving forward at all, after an order is given?

A No. If the boat has headway, making headway, if you stop, especially if the vessel is loaded, see, she wouldn't stop right away.

Q If you slam on everything you have got, it won't stop immediately, will it?

A No.

MR. CRIDER: I think that is all.

REDIRECT EXAMINATION

BY MR. HONAHAN:

Q Where were you when you heard the cry "Man overboard"?

A I was forward.

Q Forward?

A Yes.

Q And then you went to the Captain, you walked over to the port side?

(Testimony of K. Lind.)

A Yes.

Q Did you call out to the Captain before you got to him?

A Yes.

Q And did he stop the engine?

A So far as I know, I guess he did. I didn't—

Q I asked you to testify to facts within your knowledge. You testified here in answer to your proctor that he did stop the engine.

A Yes.

Q I am asking you how did you know he stopped the engine.

A I can see it.

Q You can see the engine stop?

A I can see the telegraph on the bridge when I go by, and saw the man—

Q You saw the engine telegraph?

A Yes.

Q Where were you at that time?

A I was going aft.

Q You were going aft and could see the engine-room telegraph?

A Yes, the engine-room telegraph, telegraph on the bridge.

Q How far away from the telegraph were you at that time?

A About five feet, six feet.

Q And that's all you know about whether the engine was stopped or not, was just the indicator on the telegraph?

(Testimony of K. Lind.)

A The order he gave, the Captain said, "Stop her", and she was stopped.

Q And you heard him give that order?

A Yes.

Q That's all you know?

A Yes.

Q You don't know whether she stopped or not?

A I presume. I didn't look over the side.

(At this point the Court took a recess until two o'clock p. m. of this day).

AFTERNOON SESSION.
2:00 P. M.

K. LIND,

recalled.

RECROSS EXAMINATION

BY MR. CRIDER:

Q Mr. Lind, I think you testified there was lumber piled up about nine feet high on the deck.

A Well, that was the height.

Q Let us suppose that the lumber had all been removed from the deck, all the cargo—understand?

A Yes.

Q Remove all the lumber from the deck, was there any rail around there at all?

A Yes. If the whole lumber was out of the deck there would be a railing around.

Q Can you indicate—stand up and show about

(Testimony of K. Lind.)

where that rail would come to on you—stand up and indicate.

A Well, the rail would come to about here.

MR. CRIDER: The witness is indicating a point, Mr. Monahan, which, I think, is about three and a half feet high.

MR. MONAHAN: Yes.

Q BY MR. CRIDER: The idea, then, is there was lumber piled up all around that rail and clear over the top of it?

A Yes.

Q But there was a rail on each side of the vessel about three and a half feet high?

A Yes.

Q Now, when this pilot boat came up to where the man had sank, did you see anybody in the pilot boat make any effort to rescue him?

A Yes.

Q What did you see?

A I see the man came up to him and he threw the life preserver to him.

Q The man in the pilot boat?

A Yes.

Q How far did the life preserver strike from the man in the water?

A As far as I could see, it almost ran close on top of him.

Q Did the man in the pilot boat make any grab or any other effort?

A Yes, he reached out to grab him.

(Testimony of K. Lind.)

Q How close did he grab to the man in the water?

A He must have been pretty close to him, as far as we could see.

Q Did he get any article of clothing?

A He got a hat off the man.

Q Grabbed the hat of the man?

A Yes, he grabbed his hat.

Q And the man sank, did he?

A Yes.

Q He didn't come up any time after that?

A No, sir.

Q Did the three boats that were around there cruise around that point where he sank?

A Yes. They was cruising around there for a while afterwards.

MR. CRIDER: I think that is all.

FURTHER REDIRECT EXAMINATION

BY MR. MONAHAN:

Q Did you see this man in the pilot boat take the hat from the drowning man?

A No, not exactly from the drowning man, but from the position that he was in, right alongside the boat, where the man was, so to take the hat it must be probably laying on the water or on the man's head.

Q You saw him take the hat off?

A Yes.

Q Did you not testify here a few minutes ago that the man in the pilot boat came up and told the Captain—that that was the source of your information?

(Testimony of K. Lind.)

A Told the Captain?

Q Did you or did you not so testify?

A No.

Q You didn't testify that way?

A No, I never testified that.

Q You didn't?

A No, sir.

Q I will ask you, Mr. Reporter, if you will please read his testimony.

(Reporter searches record, but fails to find testimony desired).

MR. MONAHAN: Never mind.

Q You have previously testified there was no railing or lifeline in the space opposite where the lumber was stored.

A Around the boat, no; around the deck-load of the lumber, no, there was none.

MR. CRIDER: He testified there was not nine feet up.

MR. MONAHAN: I didn't say nine feet. I said a lifeline.

THE COMMISSIONER: I want to get him straightened. He did say, I understood him, that when there was no lumber there there was a lifeline around there.

MR. MONAHAN: That was in answer to his question, yes. Previously to that, he testified there was no lifeline in that particular place where the lumber was stored.

THE COMMISSIONER: I want to find out what

(Testimony of K. Lind.)

was done with that line. Ordinarily that line was around there, but when it was loaded with lumber it wasn't there.

MR. CRIDER: I think the record contains some testimony on that. I know I didn't elicit that—of what it was constructed, but whether it was a line or rail.

THE COMMISSIONER: He said a railing.

Q BY MR. MONAHAN: Did you not testify here in answer to a question of mine that in the space opposite where the lumber is carried, that is, the rail opposite, there was no rail there nor no life-line?

A No.

Q You didn't so testify?

A I testified—no. That there was no lifeline there.

Q You testified there was no lifeline there?

A No, sir. Around the deck-load of the lumber, no. Around the deck-load of the lumber there was no lifeline.

Q Tell me what particlular part of the ship this deck-load of lumber that the deceased was standing on when he fell overboard, what particular part of the ship was that?

A It was in the forward part of the ship.

Q Forward of the waist, was it, the waist of the ship?

A Yes, the forward part.

Q Did you have a rail or a lifeline extending from

(Testimony of K. Lind.)

the stem to the stern on both sides of the ship on the upper deck?

A No.

Q That's what I'm getting at. What part of the ship was the rail or lifeline omitted from?

A There was a rail around the aft part of the ship.

Q There was no rail around the aft part of the ship?

A The aft part of the ship, yes, there is a rail.

Q What particular part of the ship is there no rail or lifeline?

A When she was loaded?

Q Yes.

A There is none around the deck-load.

Q Did you not testify a few minutes ago that there was a rail abreast of the lumber, the cargo lumber, about three and a half feet high from the deck—did you or did you not so testify?

A A rail?

Q A rail, yes, a rail—didn't you so testify?

A No, sir.

Q Did you not stand up and indicate the approximate height of the rail on your body?

A Yes; when the deckload is off the vessel.

Q As a matter of fact, there are no rails or lifelines on the outward part of the vessel where the deck-load is carried?

A When she is loaded or in the harbor there is not.

Q No rail or lifeline there?

(Testimony of K. Lind.)

A Around the deck-load in the harbor, no.

Q That is the part of the ship where the deceased fell overboard?

A Yes.

Q And there is no rail or lifelines there?

A No.

Q That's it. You testified previously that the Brunswick was inspected by the local steamboat inspector sometime last December.

A Yes.

Q Is that right?

A Yes.

Q. Were repairs made to the Brunswick in San Francisco about a year and a half ago?

A A year and a half ago?

Q Yes.

A Not that I know of.

Q You don't know.

A No, sir.

Q And you have been five years on the Brunswick?

A Off and on. Sometimes I have been away from her, and sometimes during the five years.

Q Were you attached all during the year 1921?

A To her?

Q Yes.

A Yes.

Q Were repairs made to her at San Francisco during any part of that year?

A Yes.

Q Eh?

(Testimony of K. Lind.)

A Yes.

Q How long ago was that, about?

A She went to dry-dock over to the Union Iron Works at San Francisco about three months ago, three or four, three months ago.

Q 1921?

A 1921.

Q Last year?

A No. That is this year. I am thinking of this year, 1922.

Q At the beginning of my examination I requested that all our attention be confined to not subsequent to April 18. I am asking the question, were any repairs made on the Brunswick at San Francisco during the year 1921, which is last year?

A I couldn't say.

Q You couldn't say?

A No.

Q Were you attached to her during all that year?

A. No, I wasn't.

Q Then you cannot answer the question.

A No.

Q Do you know whether she was inspected prior to December last, last December a year ago?

A This September she was.

Q A year ago this September?

A Yes.

MR. CRIDER: September or December?

A December, I mean.

(Testimony of K. Lind.)

Q BY MR. MONAHAN: A year ago this December?

A Yes, sir.

Q Which December have you reference to?

A December.

Q Which December?

A 1921.

Q She was inspected in December, 1921?

A Yes.

Q Where?

A At San Francisco.

Q You are sure she wasn't inspected before that time?

A No.

Q You are sure that she was inspected during the month of December last?

A Yes.

Q You are sure of that?

A Yes.

Q You also testified, did you not, that there was no dolphin ahead of the dredge operating over there off the Blinn Lumber Company yard?

A I never did.

Q Was there a dolphin there?

A That I couldn't say because I never took any notice.

Q When you heard the cry "Man overboard!", did you not testify you walked from the lumber pile to the port side near where the Captain was standing?

(Testimony of K. Lind.)

A Yes, walked all around.

Q Then where did you go after walking all around?

A I walked right aft to the boat.

Q You saw this man in the water then?

A Yes, I saw him in the water.

Q And you kept looking where the man was in the water?

A And I say, "We better get the boat over".

Q Then you noticed the boats were coming?

A From the dredges.

Q And you also noticed the pilot boat was coming there?

A Yes.

Q And you kept looking at them and seeing what they were doing?

A Yes.

Q How long were you in that position of observation?

A I guess from the time I go from fore to aft, about three or four minutes, something like that.

MR. MONAHAN: That is all.

FURTHER RECROSS EXAMINATION

BY MR. CRIDER:

Q You hollered at the Captain right away, did you?

A Yes, I hollered right away.

Q With reference to the edge of the boat, how close up to the very edge of the boat was this lumber piled?

(Testimony of K. Lind.)

A It was very close up to the edge, right on the edge.

Q Piled up to the very edge of the boat?

A Yes, sir.

MR. CRIDER: That is all.

(At this point the Court took a recess for a few minutes).

K. LIND,

recalled for further

CROSS EXAMINATION

BY MR. CRIDER:

Q Now, Mr. Lind, is it not a fact that, when this vessel is empty, when there is not any lumber on the deck—let us suppose his Honor's table here is the deck.

A Yes.

Q Take the lumber off of it—for instance, this is the lumber that was on it the day that man fell overboard—remove that lumber. Isn't it a fact that the side of the vessel, or call it the bulwarks, extends up about three and a half feet?

A Yes.

Q And that is above the floor of the deck?

A Yes, all around it.

Q That is what I mean. Just as I have got this book, it would extend around the edge of the vessel—like that (illustrating with book)?

A Yes.

Q About three and a half feet?

A Yes.

(Testimony of K. Lind.)

Q In this case the lumber was piled in here like these books are, so it was piled up over that (illustrating)?

A Yes, close to the rail.

Q Right flush to the rail and piled up here, and this man had his sling on top here (illustrating)?

A Yes, right on top here.

Q That is what I mean. I think that clears that up.

Q BY THE COMMISSIONER: Was that rail taken off or just the lumber piled over the top of the rail?

A The lumber was piled on top of the rail.

Q The rail was still there, but the lumber was piled over it?

A Yes.

Q BY MR. CRIDER: When you are moving about, here and there in the channel, it is not customary to put a rail around the lumber cargo?

A I never seen it.

MR. MONAHAN: I object to that as incompetent, irrelevant, and immaterial.

THE COMMISSIONER: That wasn't done in this case, however.

MR. CRIDER: No, we concede that.

THE COMMISSIONER: Your objection will be overruled. Let it stand.

Q BY MR. CRIDER: You have been in the habit of loading lumber for many years and hauling it around in the—

MR. MONAHAN: That is not in evidence.

(Testimony of K. Lind.)

MR. CRIDER: I am asking him if that is not the fact.

A Yes.

Q In all your experience, when you are moving across the channel from one lumberyard to another, or moving about inside, not at sea but inside, have you ever known in your experience or seen them put a rail around the top of the lumber?

A Never.

MR. MONAHAN: Objected to as incompetent, irrelevant, and immaterial. We are not concerned with what others have done.

MR. CRIDER: I am talking about the custom.

THE COMMISSIONER: The objection will be overruled. The answer stands.

Q BY MR. CRIDER: Regardless of the boats you were on, have you observed other boats moving about here and there in and about the channel with loads of lumber on them?

A Yes.

Q Did you ever seen one with a—

MR. MONAHAN: Same objection.

THE COMMISSIONER: Same ruling.

MR. CRIDER: Let me finish.

Q —ever see a load of that kind with a rail around the top of the lumber?

A No, sir.

Q Would it be practical to have a rail around there when they are loading and unloading lumber?

A No.

(Testimony of K. Lind.)

Q BY THE COMMISSIONER: Was this man working on the boat on this lumber prior to the boat's moving from the wharf? Had he begun to work there before the boat got under way?

A Well, he started in at 8 o'clock.

Q And what time did you move?

A About a couple of minutes past.

Q And he was working there at the time you left?

A Yes.

Q Was he notified that you were going to move the boat?

A Yes, everybody was notified.

Q Everybody was notified?

A Everybody knowed it.

Q BY MR. CRIDER: Did you tell him you were going to move it?

A It was hollered out, "We're going to move; let go of the lines".

Q He was actually working on his sling when the boat was moving out in the water there?

A Yes.

Q Preparing his sling as the boat moved along?

A Yes.

Q The intention being to move on across the channel and unload some of this lumber?

A Yes.

MR. CRIDER: That is all.

REDIRECT EXAMINATION

BY MR. MONAHAN:

Q Did you notify the deceased that you were

(Testimony of K. Lind.)

shoving off from the dock and getting under way?

A Yes.

Q Eh?

A Yes.

Q Did you tell him personally?

A Not personally; but I told everybody, I say, "Let go the lines; we are going to move".

Q By "letting go the lines, we are going to move", you had reference to the mooring lines?

A Yes.

Q The longshoremen or stevedores have nothing to do with the mooring of the vessel?

A If we want them to, yes. If we want them to let go the lines, help us pull them in, or anything, they will do so.

Q How many deckhands have you got on the Brunswick, or did you have last April on the Brunswick?

A Five men,—four men.

Q Four men?

A Yes, sir, besides the longshoremen.

Q And you use longshoremen for mooring and unmooring a ship, do you?

A Yes, sir.

Q In addition to loading and unloading the cargo?

A Yes, sir.

Q And there was no rail on the outboard side of this pile of lumber?

A No, sir.

MR. CRIDER: You mean on top, do you?

(Testimony of K. Lind.)

MR. MONAHAN: Yes.

Q BY MR. MONAHAN: On two occasions you have testified there was no rail at all abreast of that lumber.

MR. CRIDER: What do you mean by abreast of it?

MR. MONAHAN: Outboard, each side.

Q And on two other occasions you have testified that there was.

MR. CRIDER: I don't think that is true.

MR. MONAHAN: The Court will remember it. And counsel illustrated to you by these books here, and you have testified on the last two occasions that the lumber was piled right over, indicating in this manner.

A Yes.

Q Are those two answers or series of answers correct?

A They both of them are.

MR. MONAHAN: All right. That's enough for me.

Q BY THE COMMISSIONER: Were any other longshoremen on this lumber working with the deceased at the time he fell overboard?

A Yes; his partner.

Q Who was that?

A I forgot the man's name.

Q BY MR. CRIDER: Would you recall that name if you heard it, or did you ever know what his name was?

(Testimony of A. Nagel.)

A I don't know.

Q Do you see him here in the room—would you know him if you saw him?

A No, sir. He is a stranger to me.

A. NAGEL,

called as a witness on behalf of the Libelant, having been duly sworn, testified as follows:

Q BY THE COMMISSIONER: What is your name?

A A Nagel.

DIRECT EXAMINATION

BY MR. MONAHAN:

Q Will you please state your age, residence, and occupation?

A 36 years of age. Been employed for the last, practically the last ten years, as winch-driver. I am living at 1914 Santa Clara Avenue, Alameda.

Q Were you attached to and served on board the Brunswick on the 18th of April last?

A I was.

Q In what capacity?

A As winchman.

Q As winchman you are included as one of the deckhands?

A I belong to the deck crew.

Q You are one of the four men of the deck crew?

A Yes.

Q Is is true that you have got four all together, four deckhands?

(Testimony of A. Nagel.)

A I couldn't say exactly how many men we had at that particular time, but as a rule we carry a roll of eight sailors and winchman, sometimes even nine.

Q Eight seamen, you mean?

A Yes.

Q And a winchman?

A Yes.

Q That makes nine. Did you see the deceased, John H. Hoeffner, fall overboard?

A I did.

Q What, if anything, did you see when he fell overboard?

A As soon as I saw the man drop overboard, you know, I shouted at the Captain, "Man overboard!"

Q Where were you standing at that time?

A I was standing on the forecastle head, forepart of the deck-load.

Q The forecastle head?

A The forepart of the deck-load.

Q Forward?

A That is the aft end of the forecastle head.

Q Did you shout loud enough for the Captain to hear you?

A I surely did.

Q What happened after that, do you know?

A Well, at that particular time, as soon as I saw the man fall overboard, I shouted, "Man overboard!", I, myself, grabbed for the rope, sling, and tried to throw it at him. When I looked over the side with

(Testimony of A. Nagel.)

the sling in my hand I saw two men was astern already, behind the ship. The ship had passed by him.

Q Anything else come under your observation at that time?

A Well, the only thing I recollect, when these two men were putting on the sling, this man, of course, he couldn't go on the outside of this load of lumber he had piled on that sling, because this particular load of lumber was piled right on the edge of the deck-load, which is the extreme side of the ship, also the bulwarks, and he couldn't get the sling, he stood on top of the deck-load trying to pull this particular sling through there, and there was the top plank, it was a heavy plank, if I am not mistaken, a 3 by 12 redwood plank, approximately something like 18 or 20 feet long and very heavy plank, and one plank I noticed at the particular time when the man tried to put the sling on, it wasn't exactly right in place, that is, it was leaning at a slant, it was tipped; and when he stepped on there, I couldn't tell exactly how many inches the block was that they built the load on because I knew they had some job in getting the sling over, I mean towards the middle of the load, and I know the second time I saw him,—I saw him the first time when the plank tipped, and I felt even myself it wasn't a safe proposition, but he slipped a second time, and the plank tipped again and he overbalanced himself and went overboard.

Q What is the distance, approximately, from the

(Testimony of A. Nagel.)

aft end of the lumber pile the accused was standing on to the forward end where you were on?

MR. CRIDER: You don't mean the accused.

MR. MONAHAN: The deceased, I mean.

A I judge about 20 feet.

Q And you have lost the use of one eye, have you?

A I have.

Q What kind of sight have you got with the other one?

A Well, as far as looking a distance, I think I can match my eyesight with any of them.

Q How fast was the Brunswick going at the time, approximately?

A Well—

Q What speed was she making?

A According to my judgment, I should say about two or three miles, something in that neighborhood.

Q Two or three miles, or knots?

A Miles.

Q Well, three miles would be about two knots.

A A little better than two knots.

Q You had just shoved off from the San Pedro Lumber Company dock, had you, when he fell?

A We left San Pedro.

Q Just shoved off the dock?

A Shoved? I think the engine brought her off the dock.

Q BY THE COMMISSIONER: You were away from the dock, were you?

(Testimony of A. Nagel.)

A Well, that is more than I can say.

Q BY MR. MONAHAN: You say the engine brought her off the dock?

A Of course. We are not in the habit of pushing the ship off the dock.

Q I used the word—you just shoved off. How long have you been going to sea?

A I have been going to sea since 1902.

Q In the capacity of winchman?

A No. I was A. B.

Q How long have you been a winchman?

A I have been serving as winchman on this Coast, I think 1909 the first time.

Q How long have you been aboard the Brunswick?

A I have been there since, if I am not mistaken, the 12th of August, 1921.

Q Describe your routine since that time, will you, when you go to port, and how long you remain there. Let's begin when you have got a load on.

A Starting from San Francisco?

Q Yes.

A Well, we as a rule take freight San Francisco going to Ft. Bragg and remain there.

Q How long would you remain at Ft. Bragg?

A About, sometimes three days, mostly two.

Q Then you would come to where?

A To San Pedro, San Diego, Redondo.

Q What would you do at Redondo?

A Discharge lumber.

Q How long would you remain there?

(Testimony of A. Nagel.)

A That depends on how much lumber in each place, sometimes two places on the same trip.

Q You just unload and shove off?

A That is what we do after we get a cargo off. What goes in that place, we leave.

Q Just unload; and if you have cargo for the next place, you go there and discharge that?

A Yes.

Q And when you discharge that cargo, you return?

A After taking on provisions and so forth.

Q You return immediately north for another one?

A Yes.

Q And continue the operation time after time?

A Yes.

Q Do you know whether there was a lifeboat lowered or not?

A There was none lowered.

Q Do you know whether or not there were life buoys thrown?

A I didn't see the life buoy thrown, but I noticed—

Q If you didn't see it—

A I didn't say I saw it. I didn't see the life buoy thrown, I said.

Q That is all I want.

A All right. Because I wasn't aft. I was forward then, I think.

Q Was there any lumber thrown overboard?

A No, sir.

(Testimony of A. Nagel.)

Q Were you in a position to observe it if it had been thrown?

A That depends from what side it would have been thrown. To the extreme aft end I wouldn't notice it because the forecastle head is lower than the deck-load.

CROSS-EXAMINATION

BY MR. CRIDER:

Q How many of these big plank or boards did you say there were on the sling?

A One sling load?

Q Yes.

A It wasn't a very high load. I should judge from 6, 8, 7, up to 10,—6—I couldn't tell exactly. It wasn't a very high load.

Q Did I understand you to say one of these boards was kind of twisted?

A It was, yes.

Q If I can illustrate, it might be a good idea to do it. I make no claim at being a seaman. but I think I know the outline of a boat. I have got a piece of white paper here, and I have drawn what I think is a fair representation of the outline of a boat—isn't it?

A Yes.

Q I have got an arrow indicating the direction in which the boat is going. Will you indicate on there for his Honor and for opposing counsel and for the record where this load was?

A Along here. Here is the forecastle head.

(Testimony of A. Nagel.)

Q Wait a moment; what is this line from "1" to "2" that you have drawn?

A That is the end of the forecastle head.

Q Show where the lumber was piled?

A This particular load?

A Yes.

A That was piled about right here.

Q You have drawn a little line there indicating where lumber was piled?

A Yes.

Q I will put a dotted line, and write "lumber". That is where the lumber was piled?

A Yes.

Q I will take a piece of string I have here and you say they have a block in the bottom of the loop.

A In the bottom of the load?

Q Something like that?

Q BY THE COMMISSIONER: The bottom of the load?

A No, there is a block in the bottom of the load, so they put the sling underneath it.

Q Let's take these three lead pencils and put this string around them. That would be a kind of rough representation of the way they would hoist it?

A Yes.

Q Use this for the block; how does that go?

A You put it this way.

Q All right. Illustrate to his Honor.

A Now, this is the extreme side of the ship.

Q That is the edge of the deck?

(Testimony of A. Nagel.)

A Yes.

Q Let us refer to the sketch where the load of lumber is. This desk edge here would be the edge of the boat.

A Yes.

Q And your pencil along here would illustrate the load of lumber.

A Yes.

Q Go ahead.

A His partner, the man working with the deceased, he had the sling after they piled this load and put it underneath, and the man, in order to get this load, he had to go on top of this load.

Q You mean Mr. Hoeffner got on top?

A Yes, on top here.

Q And threw the sling there?

A Yes. The top plank of it was laying in a shape like this. It wasn't exactly straight with the others, consequently, when he stepped on it, it tipped.

Q It tipped?

A Yes. The first time I noticed it it was shaking when he stepped on it the first time. The second time it overbalanced. He had the sling and was trying to take it toward the middle of the load.

Q He had this string pulling towards the middle of the load?

A Yes. And it tipped, he overbalanced while holding onto the thing, and him dragging that sling underneath till he came to where the big hook is.

(Testimony of A. Nagel.)

Q And he went over the pile? A. The pile didn't drop.

Q But he went over the edge of it into the ocean?

A Yes, right into the Bay.

Q The lumber was piled how high above the floor of the deck?

A How high?

Q Yes; the lumber this sling was on.

A Well, the sling was on top of the deck-load, and the deck-load, according to my estimation, is about 9 feet, or in the neighborhood of 9 feet, above the deck itself.

Q It is true there is a bulwark that extends up above the floor of the deck?

A Yes.

Q And then the lumber was piled up on top of that bulwark about nine feet and the sling was on top?

A I don't think it was 9 feet; it may be.

Q I mean—I didn't mean 9 feet from the top of the bulwark—I mean from the deck itself.

A Yes.

Q Now, did the Brunswick have any life buoys on it at that time?

A It did.

Q How many?

A Four, as far as I remember. I never counted them.

Q I understand you to say that you did not, yourself, see a life buoy thrown from the Brunswick?

A No, I didn't.

(Testimony of A. Nagel.)

Q Did you see the life buoys immediately after this man fell overboard—did you see any of the life buoys on the Brunswick?

A I don't really remember it.

Q You don't remember seeing any one of them around?

A They may—in the excitement I don't think I see a life buoy afterwards.

Q Were they any life boats on the Brunswick?

A Yes.

Q How many?

A Two of them.

Q Did you see any other boat or boats around the point where this man sank?

A I did.

Q How many were there?

A There was one launch going along the pipe line towards the northern end. I was whistling to them and shouting and they didn't hear me. And there was a pilot launch, a white-painted launch, and a skiff.

Q Did those launches or boats come up to the place where the man sank?

A The pilot boat came first. The rest of them came later on.

Q Did you see any life buoys or lines thrown from any of those boats?

A One was thrown from the pilot boat.

Q You heard the cry "Man overboard!", or you gave—

A I gave it myself.

(Testimony of A. Nagel.)

Q What happened to your boat immediately after that cry? Did it stop or slacken speed?

A Yes—

MR. MONAHAN: I object to that question as making a statement of—

A I saw the Captain—

MR. MONAHAN: —making a statement of fact for the witness to confirm.

MR. CRIDER: He stated he gave the outcry.

MR. MONAHAN: Yes; but what happened—if you stop there, he would explain what happened. You didn't stop there.

Q BY MR. CRIDER: What happened after you gave the outcry?

MR. MONAHAN: The harm is done now.

A As far as I know—I didn't see the telegraph but I know the ship slackened speed.

Q She slackened speed?

A Yes.

Q How far back of the ship was this man when he sank?

A Well, according to my judgment, I judge about two or three hundred feet.

Q Did you see him pass out of sight under the water?

A Oh, yes.

Q And did he come back up any more?

A Why, after he was alongside of the pilot boat, he had been underneath the water previously; but

(Testimony of A. Nagel.)

that was the last time I saw him alongside of the pilot boat.

Q When you saw the buoy thrown from the pilot boat, how far did it land from the man?

A It was in the neighborhood of where he sank. That's all I know. The launch itself was stopped then.

Q After he sank and didn't come up any more, did these three boats keep scouting around?

A Yes, they were around quite a while after.

Q How long did you say you had followed the sea?

A Since 1902.

Q Continuously?

A Well, almost. I have been working for about three years in logging camps. That has been lately.

Q Have you worked on lumber boats before?

A Yes.

Q I will ask you if, in your experience on lumber boats where you are inside of a harbor or channel like you were there and lumber was piled up above the bulwarks and you are moving about in the channel, did you ever see them put rails up around the top of the lumber pile?

A No.

MR. MONAHAN: Objected to as incompetent, irrelevant, and immaterial.

THE COMMISSIONER: Objection overruled.

A I never seen it done in a harbor, moving from one place to another.

(Testimony of A. Nagel.)

Q BY MR. CRIDER: Did you ever see it done on any boat other than the ones you have worked on?

A No.

MR. MONAHAN: Same objection to the last question.

THE COMMISSIONER: Same ruling. Exception.

MR. CRIDER: That is all.

REDIRECT EXAMINATION

BY MR. MONAHAN:

Q Did you see the man in the pilot boat throw the life preserver?

A Yes.

Q You saw him?

A Yes.

Q How did you know it was a pilot boat?

A I seen her afterwards again. She came alongside afterwards, right alongside of the Brunswick. I had a close view of her.

Q And you saw the man disappear in the water?

A Yes.

Q And there were three boats around in the immediate vicinity where the man was?

A There was.

Q And you were 200 feet away?

A Something in the neighborhood of that.

Q About 200 feet away?

A Two or three hundred feet.

Q Two or three hundred?

A Yes.

(Testimony of A. Nagel.)

Q And you saw that. And these boats were all on the southern side of the man, were they?

A No.

Q Some of them were on the northern side?

A No. Some came there right abreast.

Q I mean where the man was in the water, just before he disappeared, some of these boats were on the northern side of the man?

A There was one but I don't think that one turned.

Q One boat at the northern side at the time he disappeared?

A He wasn't disappeared yet.

Q I mean at the time he disappeared. I mean at the time the man disappeared, the last time.

A They were close around there.

Q One of the boats was on the northern side of the man?

A Well, that I couldn't exactly say in what position he was.

Q Would you be willing to swear all three of them were on the southern side of the man?

A No.

Q In which direction were these boats?

A I know the pilot boat was right alongside of him. In other words, that the man, when I saw him last go down, he was on the starboard side of the pilot launch.

Q You saw the man in the pilot boat throw the life preserver?

(Testimony of A. Nagel.)

A Yes.

Q Isn't it a fact that when the pilot boat came up he put his helm to starboard and veered across to the man, went past the man and put his helm to starboard?

A I don't know if he put his helm to starboard.

Q Did he go in the direction to port?

A He may have, a slight bit.

Q Wouldn't that cut your vision off from the man?

A No.

Q It wouldn't?

A It wouldn't because the man was on the starboard side of the launch.

Q When the pilot boat came up to this man, didn't he swerve his boat to one side to go around the man to try to catch him?

A No, he came right straight up to him in line—

Q And he didn't turn the bow of the boat?

A He may have turned it a fraction and passed the man, but he had the man and he last was seen on the starboard side of him.

Q He left the man on the starboard side. Didn't the boat veer off to starboard, the pilot boat?

A That she veered off to starboard?

Q Yes.

A Not that I could see.

Q He didn't?

A No.

Q You are sure of that? I want you to be sure.

A All I can remember is that she pointed straight

(Testimony of A. Nagel.)

to us, and I saw the man the last time he come up and his hand was up and he tried to grab for it.

Q And the boat at this time, the pilot boat, at this time was heading in a northerly direction?

A Maybe it was in a northerly direction.

Q It wasn't veered off to starboard or port at all?

A It may have a fraction, but it couldn't have been very much or I would have noticed it.

Q Are you a practical sailor man?

A I am.

Q How practical are you?

A Practical, absolutely. I put my time in square rigged, going around the Horn eleven times.

Q Could you answer questions as good as the previous witness?

A I think I could.

MR. MONAHAN: All right. That is all I want.

MR. CRIDER: For the purpose of the record, I would like to ask that this diagram of the ship be marked and introduced in evidence.

THE COMMISSIONER: It will be received and marked Respondent's Exhibit.

CHRISTINA M. HOEFFNER,

the Libelant, called in her own behalf, being first duly sworn, testified as follows:

Q BY THE COMMISSIONER: What is your name?

A Christina M. Hoeffner.

(Testimony of Christina M. Hoeffner.)

DIRECT EXAMINATION

BY MR. MONAHAN:

Q Will you state your age, residence, and occupation?

A I was born in 1883.

Q Were you married; if so, to whom?

A To John Hoeffner.

Q When were you married to Mr. Hoeffner?

A It will be two years the 10th of February, this coming February.

Q Have you got your marriage certificate with you?

A Yes, sir.

MR. CRIDER: Married when?

A The 10th of February.

Q A year ago?

A It will be two years this February.

Q That would be 1920?

A Yes, 1920.

Q BY MR. MONAHAN: What age did your husband give at the time?

A 35 years old.

Q What age did he give at the time of his marriage?

A Thirty-five.

THE COMMISSIONER: She said 35 at the time of his marriage.

MR. MONAHAN: I would like to introduce the marriage certificate in evidence, with permission to withdraw it.

(Testimony of Christina M. Hoeffner.)

MR. CRIDER: Sure.

THE COMMISSIONER: It will be received and marked Libelant's Exhibit A. You want it read into the record?

MR. MONAHAN: If you please.

MR. CRIDER: The reporter can copy it into the record.

THE COMMISSIONER: This is the 10th of February, 1921; you mean two years this coming February?

A Yes.

(Libelant's Exhibit No. 1 reads as follows:

Q BY MR. MONAHAN: Your husband, was he drowned while working on the Brunswick?

A Yes, sir.

Q Now, Mrs. Hoeffner, what was the state of your husband's health while you knew him—how long have you known your husband all together?

A Three years.

Q Three years before his death?

A Yes.

Q Did you keep company with him any part of that time?

A Yes, sir.

Q During the time you kept company with him and since your marriage to him, up to his death, what was the state of his health?

A I never heard him complain. He was in the best of health, a strong, big, strong man.

(Testimony of Christina M. Hoeffner.)

Q What kind of physique did the man have?

A He was over six feet tall, two hundred and some-odd pounds.

Q What average weekly pay did he give you while you were married?

A Well, about an average of $55 a week.

Q How long had he been working as a longshoreman?

A About five months.

Q Previous to that time, where was he working?

A The Southwestern Shipyard.

Q In what capacity?

A As boss packer. Maybe Mr. Cole can tell you more about that.

Q Did you at any time during your marriage have any other means of support besides what your husband gave you?

A Not to speak of, no.

Q You were depending entirely on him for support?

A Yes, sir.

MR. MONAHAN: That is all.

Q BY MR. CRIDER: You were living with your husband at the time of his death?

A Yes, sir.

MR. MONAHAN: I would like at this time to introduce the American Table of Mortality.

THE COMMISSIONER: This will be filed and marked Libelant's Exhibit B.

(Testimony of A. W. Cole.)

Q BY MR. MONAHAN: What is the state of your health now, yourself?

A Well, I haven't felt very good since my husband died.

Q Otherwise in good health, are you?

A Yes.

A. W. COLE,

a witness called on behalf of the Libelant, being first duly sworn, testified as follows:

Q BY THE COMMISSIONER: What is your name?

A A. W. Cole.

DIRECT EXAMINATION

BY MR MONAHAN:

Q Will you state your age, residence, and occupation?

A 45 years old; oil man and shipyard worker.

Q Did you know the late John H. Hoeffner?

A 2510 East Fifth Street, Long Beach.

MR. CRIDER: What is your phone number?

A 316293.

Q BY MR. MONAHAN: Did you know the late John H. Hoeffner during his lifetime?

A For the last four years, approximately.

Q That is, four years immediately preceding his death?

A I first met him in August, 1918, I believe.

(Testimony of A. W. Cole.)

Q Were you in close contact with him at any time since you first knew him?

A Yes, sir.

Q Just tell how you became in close contact with him.

A We were both working in the Southwestern Shipyards together for about three years. Mr. Hoeffner was the head of the packing department.

Q Mr. Hoeffner was head of the packing department?

A Yes, sir.

Q Were you a subordinate of his at that time?

A Yes, sir.

Q Will you state to the Court just what the condition of his health was, his physique and health?

A The condition of his health was first class; he had a splendid physique.

Q Will you state how long he had been employed as longshoreman, to your knowledge, if you know?

A About four or five months, I believe.

Q Now, could you tell just why he was discharged from employment in the Southwestern Shipyard?

MR. CRIDER: That is incompetent, irrelevant, and immaterial.

THE COMMISSIONER: Objection sustained. However, you can ask the question and have the answer recorded for the purpose of review. Answer the question.

A He was discharged on account of the building

(Testimony of Patrick A. Gallagher.)

program of the United States Government, coming to an end, the ship-building program.

Q Do you know of your own knowledge whether he had been given assurance of employment there with the reopening of that Company?

MR. CRIDER: Same objection. We have—I don't know what you are driving at, whether he was discharged for incompetency.

THE COMMISSIONER: I cannot see the competency of it, or the relevancy.

MR. CRIDER: So far as we know, he was an exemplary man.

MR. MONAHAN: I am desiring to bring out the temporary nature of his employment and to go back to a better.

THE COMMISSIONER: Let him answer the question.

MR. CRIDER: Same objection.

THE COMMISSIONER: Same ruling.

A He had received nominal assurance, or assurance of it, I should say.

MR. CRIDER: No questions.

PATRICK A. GALLAGHER,

called as a witness on behalf of the Libelant, having been duly sworn, testified as follows:

Q BY THE COMMISSIONER: What is your name?

A Patrick A. Gallagher.

(Testimony of Patrick A. Gallagher.)

DIRECT EXAMINATION

BY MR. MONAHAN:

Q Will you state your age, residence, and occupation?

A Age 41; 141 Palos Verdes, San Pedro.

Q BY MR. CRIDER: Have you a phone?

A Yes: 149-J. Boilermaker by trade, but now longshoreman.

Q BY MR. MONAHAN: Where were you employed on April 18 last?

A I was employed by the Shipowners' Association to work the Brunswick—the S. S. Brunswick.

Q With whom did you work there?

A Well, I ain't positive whether there was six or four of us went up there; but on the way up I didn't have no working partner, and Mr. Hoeffner was going to work with Mr. Asherman. In fact I didn't have a working partner until I got aboard the ship. When we got aboard the ship they were unloading what I thought was a box of sawdust. The sailors was discharging it. Mr. Asherman was sent on the dock to loosen the lines, to let go the ship; they were going to move, that is to the Blinn Yard from the San Pedro Yard. Mr. Hoeffner came to me and said, "I'll work partners with you". I said, "Very well".

Q Is this Mr. Hoeffner, the deceased in this case?

A Yes. At that, the mate told us to go on to work. I looked at the clock in the wheelhouse. It was exactly three minutes after 8. We went forward, which I would call, well, the forward end of

(Testimony of Patrick A. Gallagher.)

the ship, to prepare the loads of lumber that was to be discharged at Blinn's, which consisted of redwood. I consider the planks about 2 by 12 and about 25 to 30 foot long. They were about 6—well, between 5 and 6 high, with a double plank, which meant about 12 inches high and about 24 inches wide. I went forward, and I got a sling, to the poop deck. There was some slings on the poop deck, that is, at the end of the lumber where the winch-driver and a man,—I forgot whether the mast stands fore or aft—yes, it stands forward, the mast, I am pretty sure. And I unloosened one of these slings and took it down and stuck it under the lumber pile, the load we had already prepared. That is, it was prepared. We didn't prepare the loads. The loads were all prepared, That was laying on the top of the deck. I shoved the sling under and where the splice connects on the string, there was threads on that splice which was hard to get through; so he leans over the load and pulls it with his hand, and he gets it pretty near through. I said, "We will pull the sling back to get it in the center of our load." Well, in doing so, he couldn't get it back. Se he stood on top of his load, exactly like that (illustrating), and he reached down to get hold of the sling and give a pull, and the board he was standing on turned, and he slipped right off back, that is, facing the ship with his back towards the water. At that time the winch-man, he hollered, "Man overboard!". I guess he and I were about the only two who seen him go overboard. I looked over the side.

(Testimony of Patrick A. Gallagher.)

The ship was going. He hit the rail, the guard on the side, with his two hands. It was just like saying one, two, three. He hit that guard with his hands, and the ship had gone by him. I had it in mind to take one of those planks and throw, but it was useless, they were too big. I thought it was the mate hollered, "Get a life buoy!" I ran aft to where this life buoy was on the starboard side. I would call it about the starboard beam, that is, the stern, and it was fastened onto the rail. There was, well, a line, it is onto the life buoy I think, it is about half inch, to my judgment, a half inch line. That line had the buoy tied to the guard rail, called a slat knot on it; a flat knot on it, a square knot is what the sailors say, and that line was wet. I tried to get that line loose, and I worked on it. Again the time I did that, we were three ship lengths away from the man in the water. The man in the water was following us, just paddling in the water. I hollered as loud as I could, and drawed this man's attention that was on the dredge, with this launch and the skiff with the launch at the dredge pipe line. They heard the calls. They started over. Then the pilot boat was coming up the bay, the pilot boat seeing this launch coming across from the dredge line, that is, he drawed the pilot man's attention, who wondered what he was running ahead of him for.

MR. CRIDER: I object to what the pilot man wondered.

THE COMMISSIONER: Just testify to facts.

(Testimony of Patrick A. Gallagher.)

A This is the facts. I am giving the whole, full detail, your Honor.

THE COMMISSIONER: Go ahead.

A I want to explain it the best I know how, of what I seen of it. This pilot boat looked in surprise—

MR. CRIDER: Wait a moment: I object to his saying he looked surprised.

THE COMMISSIONER: State what they did.

A The pilot man reaches back into his boat, and he gets out over the side, he reaches over the side, and the man's left hand was just about that far out of the water. I watched him sinking from his neck down, until his hands went down (illustrating)—

MR. CRIDER: Witness indicating the entire hands sticking out of the water.

A Yes. And it seems to me that the pilot boat touched the fingers, because the body was down as soon as he reached. Of course, I have seen occasions where men—

MR. CRIDER: Wait a moment. I object to some other occasions. We are talking about this accident.

THE WITNESS: All right.

Q BY MR. MONAHAN: Just confine yourself to facts within your own knowledge.

A The boat circled around where the body went down. The pilot boatman threw the life buoy, and this buoy that I took, I dropped it. Well, they circled around, and that man in the boat from the dredge, in the launch from the dredge, picked up Mr. Hoeffner's hat and gave it to the man in the pilot boat. We

(Testimony of Patrick A. Gallagher.)

were, at the time the man sunk, I judge a good six lengths of the ship from the body. Then the launch came up with the hat. Those fellows circled around there for half an hour I should judge afterwards in the bay. The pilot man came up with the hat and threw the hat aboard. I didn't know this man Hoeffner. Didn't know his name at the time. I went to his jacket. I knew where he placed his jacket and I looked to see if he had any identification in his pocket, and I found a little book with his name and address in it. So that was about as far as I know of it, with the exceptions of my going to the Captain in the pilot house.

MR. CRIDER: Wait a moment; is this in response to any question?

MR. MONAHAN: All right.

THE WITNESS: The Captain said to me—

MR. CRIDER: Wait a moment.

MR. MONAHAN: Q Were you in a position, or, if in position, did you notice whether or not the Brunswick stopped after the man went overboard?

A No, sir, not till the man sunk.

Q Now, do you know whether or not the engines backed?

A I have rode ships enough—

MR. CRIDER: Just a moment—

A —to indicate—

THE COMMISSIONER: Do you know whether it backed or not?

A No, sir.

(Testimony of Patrick A. Gallagher.)

Q You mean you don't know?

A I know that she didn't back.

Q BY MR. MONAHAN: How could you tell from where you were standing whether or not the engine of the Brunswick backed or not?

A You can tell by the virbation of the engines when a ship is going astern. When a ship is proceeding ahead and the engine is turned over, the vibration of that engine will almost jar you off your feet.

Q Now, were there any efforts made by the officers or crew of the Brunswick to effect a rescue of the deceased while in the water?

MR. CRIDER: I object to that as calling for a conclusion of the witness. He might tell what was done.

THE COMMISSIONER: I think you better reframe your question. I will sustain the objection.

Q BY MR. MONAHAN: Did anybody from the Brunswick throw a life buoy overboard for the deceased?

A No, sir.

MR. CRIDER: That calls for a conclusion of the witness. The question is whether he saw anybody.

Q BY MR. MONAHAN: Did you see anybody throw a life buoy?

A No, sir.

Q Were you in a position to see that, if a life buoy had been thrown you would have obcerved it?

A Yes, sir.

(Testimony of Patrick A. Gallagher.)

Q And did you see one in the water?

A Seen one threw off the pilot boat, the only one.

Q I mean from the Brunswick.

A There was none thrown from the Brunswick. The only one was thrown from the pilot boat.

Q Was the life boat lowered from the Brunswick?

A No, sir.

Q Were there any pieces of lumber or other things thrown over?

A No, sir.

Q What were the officers and men of the Brunswick doing at the time?

A Well, indeed, I don't know. One of the mates sent two of the sailors back on the port side and had the life boat just as the man sank. The mate said it was no use lowering it.

CROSS EXAMINATION

BY MR. CRIDER:

Q You saw them back there working at the life boat, did you?

A They stood there; they didn't attempt to do anything.

Q You didn't see them do anything with the life boat?

A No, they didn't attempt. Just stood there looking around.

Q You used this illustration: that he fell off one, two, three. Now, what was it you say he struck there when he fell?

A The guard.

(Testimony of Patrick A. Gallagher.)

Q What guard was that?

A On the side of the ship.

Q That is, the guard on the side of the ship?

A Yes.

Q And he struck that?

A Yes, he hit it with his hands.

Q He didn't grab hold of it?

A No, he couldn't. It is just like that desk. He slid off it.

Q And he went right over?

A Yes.

Q But there was a bulwark there, wasn't there; there was a guard there?

A There is a guard on every one of those ships, yes, sir.

Q These boats you were talking about, the pilot boat and the other boat, were all circling around there, back and forth around this place where he grabbed for his hat?

A Yes.

Q And they continued to circle around there, and finally, after circling around, one of them came up and threw the hat on board the Brunswick?

A Yes, sir.

Q That is, after they had scouted about there for some time in an effort to find the man?

A No, the pilot boat didn't scout around much.

Q The other—

A The other boats did, the row boat and skiff did. The launch from the dredge did.

(Testimony of Patrick A. Gallagher.)

Q In other words, after they threw the buoy and reached and just barely missed his hand—did he touch his hand?

A I imagine he did.

Q After that, these other two boats, to use every-day language, scoured around there back and forth over this place?

A Yes.

Q And all around?

A Yes, sir.

Q For, did you say, a period of half an hour?

A About that. I should judge about that, because they were there when we stopped at Blinn's, and we had to go up the bay around the dredge line, which was tied to—what do you call this stuck in the river—I don't know the name of them—pilots stuck in there that the pipe line was tied to. That was above the Hammond Lumberyard, come around that and into Blinn's on the other side.

MR. CRIDER: That is all.

REDIRECT EXAMINATION

BY MR. MONAHAN:

Q What kind of line was attached to this life buoy?

A I should judge it was the size of a fountain pen. A little bit bigger, maybe.

Q Like this?

A About the size of that, yes, sir.

MR. MONAHAN: I ask the Court to take note of the size of the line attached to the life buoy indicated by the size of this fountain pen.

(Testimony of Patrick A. Gallagher.)

THE COMMISSIONER: Which life buoy are you talking about?

MR. MONAHAN: The life buoy attached to the Brunswick.

Q How long were you working at this square knot you speak of, trying to get it adrift?

A Well, I have been in—

Q Never mind that.

A —tying knots all my life—

Q Answer the question; how long were you working at this knot?

A On the ship?

Q Yes.

A I should judge between four and six minutes, anyhow.

Q And you found it secured, you found the life buoy secured to the rail with a piece of line the size of a fountain pen?

A Yes, sir.

Q And tied with a square knot?

A Yes, sir.

Q And you had considerable difficulty in untying that square knot?

A Yes, sir.

Q Are you familiar with knots and splices?

A Yes, sir.

Q Would you know how to untie a square knot quickly?

A Yes, sir.

(Testimony of Patrick A. Gallagher.)

Q There wasn't any kind of slip attachment for slipping the thing through?

A No, sir. There was a slip that is, where the buoy sat into, you see, a canvas sack where the buoy sat in, but he was tied on the top of the rail so you couldn't pull the buoy off.

MR. MONAHAN: That is all.

RECROSS EXAMINATION

BY MR. CRIDER:

Q Do you recall one of the sailors of the Brunswick coming up there when you were passing around with the buoy and throwing it overboard?

A He didn't do no such thing. The buoy was on the deck still after the man went down.

MR. CRIDER: All right.

Q BY MR. MONAHAN: You stated you had some talk with the Captain immediately after the man Hoeffner disappeared from view in the water. What did he say and what did you say to him?

MR. CRIDER: I object to that on the ground it is incompetent, irrelevant, and immaterial.

MR. MONAHAN: Part of the res gestae. Immediately afterwards. Immediately at the time when the circumstances were fresh in the mind—what the Captain said.

THE COMMISSIONER: That would be hearsay, wouldn't it?

MR. MONAHAN: No; res gestae, one of the exceptions to hearsay. Honestly, it is.

(Testimony of Patrick A. Gallagher.)

THE COMMISSIONER: Let him answer it; overruled.

A I went to the Captain; he was in the pilot house; he said to me, "The man is to blame". I said, "Now listen here, Captain; you can't blame that man; you can't blame the man and can't blame yourself". I said, "It was a pure, simple accident." "Well," he said, "I guess you are right." I said, "Those things is going to occur to any of us any day"—which he agreed with me on.

Q BY MR. MONAHAN: How long would you say the Brunswick kept her headway—how long did she remain stopped?

A Well, I should judge possibly two or three minutes, and then she proceeded on again.

Q Did she at any time gather stern during this accident, after the deceased fell, gather stern board—that is, did the vessel start to go astern?

A No, sir. No, sir.

Q She gathered no stern board.

A No, sir.

Q This dolphin that you testified about, where was the vessel in relation to that dolphin?

A In relation to the dolphin? Well, we were going toward it. I should judge we were within one or two hundred feet of it.

Q I don't mean distant from—whether you were abreast of it or astern?

A It was ahead of us.

MR MONAHAN: That's all.

(Testimony of Peter Durante.)

MR CRIDER: That's all.

THE COMMISSIONER: Call your next witness.

PETER DURANTE,

a witness called on behalf of the libelant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Q BY THE COMMISSIONER: What is your name?

A Peter Durante.

BY MR MONAHAN:

Q Will you state your age, residence and occupation?

A 41 years of age. 1554 Narbonne Avenue, Lomita.

Q Have you got a phone?

A No, sir.

Q Where were you employed on the 18th of April last?

A In the U. S. Engineering Department, dredging harbor department, running a launch.

Q Will you describe the location of this drege—did this dredge have any scows and pipe line attached?

A We have about, we were at that time, about 36 pontoons little scows, 30 to 40 feet long.

Q How many did you have?

A From 36 to 38.

Q You used them for loading pipe line?

(Testimony of Peter Durante.)

A Yes, sir.

Q How was the dredge secured?

A Secured by what we call spuds. They have two spuds in the stern of the dredge and she swings from one side, has a cable on each side.

Q Did you have a dolphin or dolphins ahead of you?

A We had a dolphin. Well, it was astern of the dredge but it was north of the dredge. The head of the dredge was facing south.

Q How far north of the dredge was the dolphin?

A Well, I should judge 500 feet at least south of the dolphin.

Q North of the dolphin.

A No, south.

Q I mean how far north of the dredge was the dolphin?

A About 500 feet.

Q Were you connected with that, was your dredge connected with that dolphin?

A The pipe line was connected to that, which pipes goes underneath the water to the mainland. We had a submerged line.

Q Would a vessel be allowed to pass between this dolphin and the dredge?

A No, sir.

Q How far away was this, approximately how far away from the San Pedro shore line was this dredge with the scows?

A From the San Pedro Lumber Company docks?

(Testimony of Peter Durante.)

Q Well, say from Kerckhoff's—

A From the San Pedro side?

Q Yes.

A Well, it is between somewhere, let's see three, about seven hundred feet. The channel is 1000 feet and we were 300 feet the other side.

Q Did you attempt to rescue a man, John H. Hoeffner on the 18th of April last?

A Yes, sir.

Q Just state the circumstances in connection with your attempt to rescue him.

A I was coming up the bay from taking the crew ashore. I was coming north, coming up. The boys was working on the pipe line, about, I should judge, five or six pontoons away from the dolphin. The pipe line was busted or something and they were working and I went up to help them. When I got there they were pointing over that way towards the Pedro side and hollering at me but the engine, gas engine making so much noise, I couldn't understand what they were saying, and I come out of the cabin of this launch and listened and I heard a fellow on the Brunswick hollering, "Go get that man". I looked over in that direction and saw the man struggling in the water. Then I didn't pay attention to anything else. I rushed over there and had to circle around at first by the stern of the—

Q Brunswick?

A Yes, sir.

Q Making a circle going to the rescue of this man?

(Testimony of Peter Durante.)

A Yes. I was going straight for him and I saw the pilot boat coming. I got out and pointed to him and he looked out and he didn't know that the man was overboard. When he saw me coming he looked, and, of course, his boat was going fast and he tried to check the boat and he reached down—of course, I had to work to avoid a collision with him. That throwed me off my course. And just as the pilot boat was passing the man reached down, the man had his hand up in the air about that much out of the water.

MR CRIDER: Indicating the entire hand out of the water.

A (Continuing) He made a grab for his hand but just as he missed it, he just missed his hand, and then, of course, I tried—he went by. When he was 20 feet away from him, I should judge, he grabbed a life preserver off his launch and throwed it at the man. It landed about six or seven feet from the man.

Q Which side of the vessel, that is, which side of the life boat was the deceased at the time the life buoy was thrown to him?

A Which side of the pilot boat?

Q The pilot boat.

A The starboard side. He was on the starboard side.

Q Which way was the pilot boat heading at that time?

A I should judge just about due north.

(Testimony of Peter Durante.)

Q Now, did the pilot pick up the hat of the deceased?

A No, he didn't.

Q Who did?

A A fellow by the name of Johannesen came over with a skiff and he picked the hat up after the man went down.

Q You saw it?

A Yes, and he passed it to the pilot man.

Q Did you see the Brunswick at the time the man disappeared?

A Yes, sir.

Q How far away from the deceased was the Brunswick at that time?

A I should judge between 6 and 700 feet, about three ship lengths off.

Q In which direction was the Brunswick going after you noticed, at the time that your attention was directed from her to this man in the water?

A She was kind of turned about northeast I should judge more north.

Q That is, her bow was heading over towards the east San Pedro side?

A It looked to me as if he was heading for the Blinn Lumber Company.

Q At this time did you notice, did the Brunswick back her engines?

A Well, my idea is she didn't. Of course I couldn't swear to that.

(Testimony of Peter Durante.)

Q But she did have headway on her at the time you first noticed her?

A Yes, it was still going, moving ahead.

Q At the time you first noticed her?

A Yes.

Q After you got down to where the man was did you have an opportunity to notice, or did you notice the Brunswick then?

A After the man went down, I did, yes.

Q What was she doing then, going ahead or stopped?

A After I saw the man go down I looked up and the steamer schooner was, I should judge, she was about six or seven hundred feet away from the man and at that corner of the dock.

Q Did she appear to be going ahead or stopped or backing?

A Just about laying still at that time.

Q Are you familiar with vessels of the Brunswick type?

A Why, yes.

Q Would you be able to—

A I have never been on them.

MR CRIDER: You say you have never been on them?

A No.

MR CRIDER: You are not a sailor?

A No.

MR MONAHAN: Are you a boatman?

(Testimony of Peter Durante.)

A I am registered in the U. S. Engineers as a launch master. I am running launches since 1906.

Q BY MR MONAHAN: After a vessel like the Brunswick backs, would you notice her engine churning up water?

A I could notice the wake of the water; the foam that I couldn't say.

Q You are satisfied then that the deceased never came up again that day?

A I was around there searching around at least 15 minutes after he went down.

Q Did you see any life preserver in the water other than the one thrown by the pilot?

A No, sir.

Q Did you see any plank, piece of wood, that is substantial piece of wood, or anything else, that would assist in rescuing a man in the water?

A No, sir. In fact, I looked on account of Tom Johannesen, the man who brought the hat, told me there was no plank or nothing overboard and I looked around—

MR CRIDER: I move this testimony in regard to what Johannesen said be stricken out.

THE COMMISSIONER: It will be stricken out.

Q BY MR MONAHAN: In looking around, did you see any lumber, life preserver or chest cover?

A Not only the one the pilot boat threw out. The only one I saw was the pilot boat.

Q What time was this, about?

(Testimony of Peter Durante.)

A I should judge about 8 o'clock, between 8:15 and 8:20.

Q What was the approximate distance from where you were at the time you heard the shouting from the Brunswick to where the man was in the water?

A When I started for the man?

Q Yes.

A About 700 feet.

Q And the vessel was the same distance from the man?

A Just about the same as from the pipe line, that is, up north further he was.

Q Yes. Did you see another boat coming up there to attempt to rescue the deceased?

A Besides the pilot boat?

Q Yes.

A The skiff.

Q Who was in the skiff?

A Mr Johannesen.

Q Do you know him personally?

A Yes, sir.

Q Have you known him before?

A I have known him for years, about 10 years.

CROSS EXAMINATION

BY MR CRIDER:

Q How long was the boat that you had?

A 35 feet in length.

Q Just a small launch, was it?

A 35 feet in length.

Q It was capable of moving about rapidly, was it?

(Testimony of Peter Durante.)

A Pretty rapid, 35 horsepower engine.

Q How big was this other pilot boat?

A She is a little over 40.

Q Then there was a skiff there, too?

A The skiff was coming over and he got there kind of late.

Q You all searched around there?

A After the man went down, yes.

Q BY THE COMMISSIONER: When you found out there was a man overboard, how far were you from the Brunswick?

A I should judge about 700 feet, six or seven hundred.

Q Was the man in the water between you and the Brunswick? In other words, were you further away from the man than the Brunswick was?

A I should judge we were about the same distance only I was east and the Brunswick was north.

Q About the same distance from him?

A About the same distance from him.

Q Kind of triangular, was it?

A Yes, sir. I was east and he was north from the man.

Q BY THE COMMISSIONER: And the man sank just about the time you reached the point where he was?

A Yes, just about. I should judge a minute or so afterward.

THE COMMISSIONER: That's all.

MR CRIDER: That's all.

(Testimony of Thomas Johannesen.)

(At this point the Court took a recess for five minutes.)

(After recess.)

THOMAS JOHANNESEN,

a witness called on behalf of the libelant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Q BY THE COMMISSIONER: What is your name?

A Thomas Johannesen.

BY MR MONAHAN:

Q State your age, residence and occupation, please.

A 51. U. S. Engineers Department.

Q Where?

A City of San Pedro.

MR CRIDER: What is your residence address?

A First Street, Lomita.

MR CRIDER: Have you a phone?

A No, sir.

Q BY MR MONAHAN: Where were you on April 18th last?

A I was working on the pipe line. We busted a pipe line and we was repairing it. I was working unscrewing the rubber connection that connects the pipe together.

Q Did the lumber schooner Brunswick come under your observation at that time?

A I didn't notice it before I heard someone hollering, "Man overboard".

(Testimony of Thomas Johannesen.)

Q Where did the cry of "Man overboard" come from?

A From the Brunswick.

Q Where was she at the time you heard the cry "Man overboard"?

A She was just abreast from where I was working.

Q How far away, about, was the Brunswick at that time from the man overboard?

A Oh, I guess about 300 feet.

Q What was the Brunswick doing at this time? Was she going ahead or stopped or going astern?

A She was going ahead.

Q Now, what happened when you heard the cry "Man overboard"?

A I throwed my tools away and jumped in the skiff, untied the skiff and started to pull over.

Q With relation to the Brunswick how far away from the man overboard were you?

A I was about, I guess, about 800, between 7 and 800.

Q Six or eight?

A Seven or eight.

Q How far away from the man overboard was the Brunswick at the time you started to pull away?

A I guess she was about 300 feet—

Q Who else was pulling there besides yourself at that time, who else was going to the rescue?

A I didn't see anybody when I started off. When

(Testimony of Thomas Johannesen.)

I was about half ways, a little more than half ways, I see a man come with a Government launch.

Q Did you get there at the time the man went under the water?

A No. He was ahead of me. The launch went by me. When I got over there the pilot boat was there and he was drowned then.

Q Did you get there just about the time the man disappeared for the last time?

A Just about the time he went down.

Q What kind of skiff is this that you are speaking of; is it a heavy working boat or is it a little light frail boat?

A It is a heavy working skiff used on the pipe line.

Q Now, was there anybody else in the skiff but yourself?

A All alone.

Q So you pulled double sculls then?

A Yes.

Q Do you recall how the tide was at that time, ebbing or flooding?

A The tide was coming in, I guess, as far as I remember. I ain't quite sure.

Q How far away from the dock at San Pedro was the man who was in the water when you saw him?

A He was not quite midway between the wharf and the pipe line.

(Testimony of Thomas Johannesen.)

Q Not quite midway. Which side was it closest to?

A The lumber wharf.

Q What lumber wharf?

A The Kerckhoff.

Q What part of the Kerckhoff lumber yard was she close to, the southern end, the northern end or the middle?

A Right abreast from the office.

Q Abreast of the Kerckhoff Lumber Company's office. Did you see the pilot reach out his hand for the deceased?

A I didn't notice it.

Q Did you see the pilot take the hat of the deceased?

A No, I took it.

Q You took it?

A Yes.

Q A witness has been here and testified that he saw the pilot take it; are you sure you took it?

A Yes, sir. I pulled the skiff and took the hat and gave it to the man in the pilot boat.

Q How long did you remain around in the vicinity of where the deceased was?

A I was around there for about 10 and 15 minutes.

Q And he did not reappear?

A No, sir.

Q At the time that the deceased disappeared for the last time did you notice where the Brunswick was?

A He was going ahead.

(Testimony of Thomas Johannesen.)

Q How long have you been in the boating business down there at San Pedro?

A I have been on the dredge between 10 and 12 years.

Q And have you been in the boating business before that in connection with harbor work?

A Yes, I have been going to sea.

Q Are you a practical sailor man?

A Well, I been going to sea for about 20 years, more than that.

Q You are familiar then with a vessel when she is going ahead, stopping or backing?

A Yes.

Q And you are prepared to say the Brunswick was not stopped, or was she backing—by backing, I mean going astern at the time the deceased disappeared the last time?

A I couldn't say if the engine was stopped. I guess it was but I couldn't see him backing.

By backing I mean going astern, the ship actually going astern, having stern board, not what the engines were doing, but whether the vessel had stern board on?

A He was going ahead aways.

MR CRIDER: No questions.

MR MONAHAN:

May it please the Court we have got another witness. It is more or less cumulative, though testimony similar to what those others have testified to and

(Testimony of Thomas Johannesen.)

he has been ordered by you to reappear here but he has failed to show up.

MR CRIDER: I will stipulate his testimony would be the same as this man's.

MR MONAHAN: All right.

MR CRIDER: What is his name, for the purpose of the record?

MR MONAHAN: Peterson. There is Asherman, too.

MR CRIDER: I will stipulate their testimony would be the same.

MR MONAHAN: More or less of the same caliber, cumulative.

THE COMMISSIONER: All right. Was it admitted that the appointment of the administratrix was made?

MR CRIDER: We will admit that.

MR MONAHAN: That was stipulated.

THE COMMISSIONER: What about the letters of administration?

MR MONAHAN: I would like to introduce at this time, may it please the Court, the letters of administration. I have got one more witness.

WILLIAM HACK,

a witness called on behalf of the libelant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

Q BY THE COMMISSIONER: What is your name?

(Tesimony of William Hack.)

A William Hack.

MR MONAHAN: At this point I would like to introduce in evidence with permission to recall it, letters of administration issued to Mrs Christina Hoeffner, the libelant here.

THE COMMISSIONER: They will be received and filed and marked Libelant's Exhibit C.

Q BY MR MONAHAN: Will you state your age, residence and occupation?

A 33. 451 First Street, San Pedro.

Q What is your occupation?

A Millman, lumber man.

Q At what lumber yard are you employed?

A The Kerckhoff.

Q Were you employed there on the 18th day of April last?

A Yes, sir.

Q Did vou see a man falling overboard from the Brunswick—did the lumber schooner Brunswick come under your observation on that date?

A She was going by and I thought she was coming in. I was going to catch the line. I was at the end of the dock and I seen a man floating in the water.

Q What was the Brunswick doing at this time when you saw a man floating in the water?

A She was going ahead.

Q What time was this you saw the man in the water?

(Tesimony of William Hack.)

A It was about 10 minutes after 8, quarter past, something like that.

Q Then what happened; did the Brunswick continue on its course?

A She kept on going. There was no, I seen no life preserver thrown over.

MR CRIDER: I move that be stricken out.

THE COMMISSIONER: Motion granted.

Q BY MR MONAHAN: Were you in a position to closely observe the Brunswick at that time?

A I was about 200 feet, I guess.

Q I mean, there was no intervening object between you and the Brunswick?

A No.

Q And you particularly noticed the Brunswick thinking she was coming alongside of your dock?

A She left San Pedro dock. I seen her coming and she went on by. That is how I noticed this man in the water. I was watching the boat.

Q Did you see the Brunswick throw any life preserver?

A No, sir.

Q Any piece of lumber?

A Nothing.

Q Or chest cover or other floating substance to the rescue of the man in the water?

A Not a thing.

Q How long did she continue on her course going ahead after you saw the man in the water?

A I reckon she went the other side of Kerckhoff's.

(Tesimony of William Hack.)

Q Where were you standing when you saw the man in the water?

A I was at the office of the Marine Shop, right at the end of the dock.

Q Just about how far from the southern end of the dock were you standing at that time?

A From the south end corner?

Q Yes.

A I reckon about 700 feet.

Q I say how far from the southern corner were you standing, the southern corner of the Kerckhoff dock?

A I was standing on the end.

Q What is the length of the Kerckhoff dock?

A I figure about 8 or 900 feet long.

Q And the Brunswick, when you saw her, you saw her at the northern end of the Kerckhoff lumber dock?

A Yes, sir.

Q And the man had fallen overboard from her while she was near the southern part of the dock?

A I don't get that.

MR CRIDER: I object to that as leading.

THE COMMISSIONER: Objection sustained.

Q BY MR MONAHAN: Did you see the Brunswick after the man had been in the water a little while?

A Yes, sir.

Q Did you see the Brunswick back her engines or did you see the propellers washing the water up?

A No, sir.

(Tesimony of William Hack.)

Q Did you see her at any time when she was doing anything other than going ahead?

A She didn't come back, I know that.

Q Did you notice that she backed her engines at all?

A I never noticed.

Q But you did notice the ship?

A I did notice the ship, yes.

Q How far away from the Kerckhoff dock was the deceased at the time you saw him in the water?

A I reckon about 200 feet.

Q Did you see the boats coming to his rescue?

A I seen a pilot boat.

Q Did you see the launch?

A Yes, sir, the dredger.

Q Did you see the skiff?

A Yes, sir.

Q Which Mr Johannesen had?

A Yes, sir.

Q Did you see the pilot take the hat of the deceased from the water?

A No, sir.

Q Did you see anybody take the hat?

A I know the fellow in the skiff picked up the hat.

Q You saw him pick that hat up?

A Yes, sir.

Q Did you see the man when he went down for the last time?

A Yes, sir.

Q BY MR CRIDER: These two boats and the

(Tesimony of William Hack.)

skiff started around there and tried to find the fellow, trying to rescue him?

A Yes, sir.

MR CRIDER: That's all.

MR MONAHAN: That's all. Now the libelant rests subject to those two witnesses coming in.

MR CRIDER: It is stipulated their testimony would be the same as Johannesen.

MR MONAHAN: Yes.

MR CRIDER: At this time, may it please the Court, I move for a non suit on behalf of the respondents on the ground that there has been absolutely no active negligence here shown on the part of the respondents; there has been absolutely shown by the plaintiff's own case, the libelant's own case, that the vessel was seaworthy in every respect and complied with all the requirements in that regard. None of the acts of negligence which are alleged have been shown to exist and it has been shown that it was purely, absolutely, an unavoidable and inevitable accident. In other words, they have absolutely made no case, shown no active negligence as pleaded or otherwise which would entitle them to relief as against the respondent and I move for non suit on that ground.

(Discussion and arguments on motion for non suit.)

THE COMMISSIONER: I will deny the motion. You put on your testimony.

MR CRIDER: I will call Mr. Brown.

(Testimony of William O. Brown.)

WILLIAM O. BROWN,

a witness called on behalf of the respondent, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR CRIDER:

Q What is your name?

A William O. Brown.

Q You were present at the time Mr Hoeffner fell overboard?

A Yes, sir.

Q And what was your occupation at that time?

A Chief Engineer of the Brunswick.

Q And where were you at the time he fell overboard?

A On the upper deck, aft.

Q Just tell what you saw there.

A I heard them holler, "Man overboard", rushed to the side and started to get a life buoy but I seen it was too late so I didn't get one.

Q Did you see anyone throw a life buoy from the Brunswick?

A Yes. Charlie, a sailor, came by and a man was trying to get one out and Charlie came up and pulled it out and throwed it overboard.

Q What is that?

A A partner of this man overboard was trying to get one out and wasn't making much of a success and Charlie, the sailor—

Q Mr Gibson?

A Yes, sir. He pulled it out and throwed it

(Testimony of William O. Brown.)

overboard astern. It lit away short of the man because he was away the other side.

Q After the cry "Man overboard" was the movement of the vessel Brunswick checked or altered in any way?

A Stopped.

Q And then what?

A Stopped for probably half a minute and full astern.

Q Full astern; then what did it do after that?

A The speed of the vessel was checked entirely and by doing so the stern went inshore, he gave her a kick ahead and backed her full speed again until she was going astern slowly and then stopped.

Q Was it possible to back that vessel directly straight backward, as you would an automobile?

A No, sir. A right handed engine always back to port.

MR MONAHAN: That is not responsive at all. I move that be stricken out as not responsive.

THE COMMISSIONER: Objection overruled.

Q BY MR CRIDER: What kind of vessel was this—what kind of engine—a right hand engine?

A Yes, sir, a right handed triple expansion engine.

Q It stopped and went back?

A Yes.

Q Did he strike anything?

A Well. if it kept going it would have went in the docks stern first.

Q After it got to that point, what then?

(Testimony of William O. Brown.)

A Kicked her ahead to straighten her out.

Q And after straightening up?

A Backed again full speed.

Q Did you see anybody make any movement to lower anv life boat?

A The mate and I think it was two sailors started to get the boat ready. The mate said to get the boat ready.

Q Why wasn't that boat lowered?

MR MONAHAN: I object to that as calling for a conclusion.

MR CRIDER: If you know.

MR MONAHAN: He is an engineer. He isn't a sailor.

THE COMMISSIONER: Objection overruled.

A By the time they could have got the boat in the water the other boats were there already.

Q BY MR CRIDER: The other boats were at the point—

A —where the man was.

Q You are positive you saw Mr Gibson throw the life buoy overboard?

A Yes, sir.

Q How many life buoys were there on the boat?

A Four astern.

Q How many life boats?

A Two.

Q Did you see the man in the pilot boat around the scene where the man went down?

A Yes.

(Testimony of William O. Brown.)

Q What was he doing?

A He reached for the man and he didn't get him.

Q What did he reach with?

A His hand.

Q Did he reach with anything else?

A And he throwed him a buoy and he didn't come up so he took a boat hook and reached down all around and I guess he didn't feel anybody and he pulled the buoy back with his boathook.

Q All these men with these boats was there by the time your men got started lowering the life boat?

A Yes, sir.

Q Can a life boat be detached and lowered instantly?

A No, sir.

MR MONAHAN: I object to that as calling for a conclusion of the witness. He is not qualified even as a sailor man—chief engineer.

THE COMMISSIONER: The objection is it calls for a conclusion of the witness and he is not qualified to answer?

MR MONAHAN: Yes. Can a vessel be lowered? Let us get the facts and circumstances.

Q BY MR CRIDER: How long have you followed the sea?

A 25 years.

Q Have you seen life boats of the kind that were on the Brunswick, lowered?

A Yes, sir.

(Testimony of William O. Brown.)

Q And you know how they were equipped at that time?

A Yes, sir.

Q Equipped as those life boats were, would it be possible to lower one of them instantly?

A No, sir.

Q They had been tied up there for some time, hadn't they?

A Well, we use that boat most every time in the Mendocina dock at Fort Bragg to get the lines out with.

Q How long a time would it have taken to have lowered the life boat, that is, to detach it and everything and lower it?

MR MONAHAN: Objected to as incompetent, irrelevant and immaterial.

THE COMMISSIONER: Objection overruled.

A I should say a minute or two minutes, anyway. May be three.

Q By that time the other boats were up there?

A That depends on where your men is at the time you want to lower them.

Q Of course, the men have to get up there?

A Yes, from their work.

Q In that period of time the other boats had drawn up?

A Yes.

Q To the scene where the man went overboard?

A Yes.

Q Or where he was sinking?

(Testimony of William O. Brown.)

A Yes, sir.

Q From your experience as chief engineer of that boat would you say, with your knowledge of its equipment and its engine, would you say it was stopped and backed as quickly as it could have been?

A Yes, sir.

MR MONAHAN: Object to that as incompetent, irrelevant and immaterial.

THE COMMISSIONER: Objection overruled.

Q BY MR CRIDER: And it was impossible to back it straight back?

A Yes.

Q And having turned towards the dock it had to angle forward again?

A Yes.

MR CRIDER: Cross examine.

CROSS EXAMINATION

BY MR MONAHAN:

Q Did you see the vessel when she pointed toward the Kerckhoff lumber dock?

A Yes, sir.

Q Where were you at that time?

A Astern.

Q Can you see all the way forward?

A From either side of the house, two rooms in it, you could see clear forward.

Q You had that particular spot, did you?

A Oh, astern.

Q You were located in that particular spot at the time, were you?

(Testimony of William O. Brown.)

A I was all over the stern from one side to the other.

Q And parts of the time you were not there, were you?

A I was all over the stern all the time.

Q All over the stern all the time. And you say, the engine, you couldn't back the engine when you were going ahead slowly?

A You can back full ahead, speed ahead, from a stand, yes, sir.

Q Is there a man down there at the throttle all the time?

A Yes, sir.

Q Have you got a telegraph, engine telegraph indicator there?

A Yes, sir.

Q Suppose the captain rings "Stop"—

A —yes, sir.

Q You throw a light up?

A At stop her.

Q And full speed astern, you reverse it, don't you—that might be done in the space of an instant?

A Steam reverse.

Q Full speed astern. Do you remember what steam you were carrying at that particular time?

A 175 pounds to the square inch.

Q Would that enable you to go full speed?

A Yes, sir.

Q You had full speed steam in your boilers at this particular time?

(Testimony of William O. Brown.)

A Yes, sir.

Q Notwithstanding your testimony here and the fact that the vessel went away to the Kerckhoff Lumber Company and that men were shouting to the people across the way, you would be willing to testify, and you have testified, that they got out the life boat, they couldn't have got out the life boat?

A They could have got the life boat out but the other boats would have been there first.

Q What kind of purchase have they got for the life boats?

A Double blocks.

Q Describe the purchase?

A Well, its hard to describe it—double blocks on top, single bottom. That would cover double purchase.

Q You think so?

A I think so.

Q You don't know?

A I have helped pull them up. I know four men can pull them up, two on each end.

Q Was there any effort made to use them on that occasion?

A They were getting the lines all ready to lower.

Q They were secure at the time, were they?

A Well, to keep from rolling, that's all.

Q Yes, secure to keep from rolling—and that was the life boat, is it?

A That is one of them.

Q Which one of them did they attempt to cast adrift?

(Testimony of William O. Brown.)

A The port one.

Q And the man fell over on the starboard side, did he?

A Yes, sir.

Q And made no effort to cast the starboard life boat adrift, did they?

A No, sir. The port one is the best one to get over.

Q What was the matter with the other one?

A Nothing the matter, only they handle the port one the most. That's all.

Q BY THE COMMISSIONER: What did they do towards lowering the boat?

A Took the lines loose that was holding her on the inboard side and where the lines are wrapped around the davits, got them loose and everything ready to hoist her up and throw her over.

Q But they didn't hoist her up?

A No, sir.

Q They didn't throw her out beyond the lines?

A No, sir.

Q They didn't raise her up at all?

A I don't think they did. I wouldn't say as to that, but they didn't move her out if they did.

Q How many men did you have working on the life boat at the time? Did you have all the men that were necessary to lower it?

A Yes. There was enough men up there to lower it.

(Testimony of William O. Brown.)

Q BY MR MONAHAN: How many men were there?

A Well, there was two mates and two sailors that I know of. There might have been more. And myself. I was there in case they started to lower it.

Q BY THE COMMISSIONER: Then, when they saw there were three boats attempting to save the man, then the crew of the Brunswick did nothing further —and they stopped?

A Stopped and waited, yes, sir.

Q They did nothing after that; when they saw these other boats they didn't do anything?

MR CRIDER: That was after, if your Honor please—if I may point out—

THE WITNESS: That was just about the time they was reaching for the man.

Q BY THE COMMISSIONER: Did you see the man in the skiff start out to the rescue?

A Yes, sir.

Q And he succeeded in getting from where he started to within a few yards of the man before the man sank?

A Well, the skiff was quite a little ways away. The two launches were lots closer than he was.

Q What kind of life boat is this you have got?

A It is a standard life boat, American type, just a wooden boat, wooden life boat. It is not the Clinker type. That is one the planks lap over the other.

Q It is not a power boat, but has to be manned by oars.

(Testimony of William O. Brown.)

A Oars, yes, sir.

THE COMMISSIONER: That's all.

CROSS EXAMINATION

BY MR CRIDER:

Q These other boats you saw come in rushing up there were manned by—

A —gasoline.

MR MONAHAN: Not all.

Q Two of them were.

A Commonly called motorboats or gasoline boats.

Q And this man had sunk for the last time before they finished with their work they had started at lowering the life boats?

A Yes, sir, just about that time. When the man reached for him it was no use, because the boat was there.

Q BY THE COMMISSIONER: Were you going full speed at the time the man fell overboard?

A Well, the engine was full speed but the boat hadn't pick up headway. I will say we wasn't going more than three miles an hour, any more than that. It might have been less.

Q How far were you from the place where the man sank when you saw the boats around?

A Well, between two and three hundred feet.

Q And how close did you get to that point before you stopped and went in the other direction?

A Just about stayed in the same place. We laid there for some time, five minutes. My log book shows it was 25 minutes from—

(Testimony of William O. Brown.)

MR MONAHAN: I object to the log book.

THE COMMISSIONER: How long?

A 25 minutes from the time we got full ahead until we stopped at the dock at the other side so we must have laid 5 minutes.

Q Then you never were going backward?

A Yes, sir.

THE COMMISSIONER: That's all.

Q BY MR CRIDER: You say you were going backwards? I think you testified to that before.

A I did.

Q What were your movements backward?

A Full speed astern.

Q And as I understand it, the boat would—you couldn't with that kind of engine, go straight back?

A No, sir.

Q And you went back and that threw you towards the dock?

A It did.

Q If you had continued you would have gone into the dock?

A Yes.

Q And then you went ahead and back and picked up again?

A Yes.

Q That was a narrow channel?

A Yes, sir.

Q About how wide?

A I should say it is not more than 300 feet anyway, where the pipe lines were.

(Testimony of William O. Brown.)

Q So it would be impossible to back for any considerable distance, to back straight back?

A No, sir.

RECROSS EXAMINATION

BY MR MONAHAN:

Q Would it be possible to back, would you be willing to state that the distance from the pipe line to the San Pedro shore was over 700 feet?

A Well, I couldn't say as to that—the judgment of that distance. I never paid much attention to it.

Q You say that the vessel was only a couple of hundred, two or three hundred feet ahead of the man in the water?

A That is what I should say.

Q Wouldn't it be possible to back down there?

A No, sir.

Q It wouldn't?

A No, it wouldn't. It might be probable if the tides were in your favor and everything.

Q Which way do you want the tide to back down there to that man?

A Well, the currents would have to swing you down.

Q You want the tide going out to back down?

A I wouldn't say.

Q Which way would you want the tide to be?

A I am not captain of the boat. I wouldn't state that.

Q Why did you testify a few minutes ago it was impossible?

(Testimony of William O. Brown.)

A It is impossible because I have tried a thousand times to—

Q And still you don't know how it could be done and how it couldn't?

A I know it can't be done.

Q Did you ever try it?

A I have seen it tried.

MR CRIDER: He testified that—

MR MONAHAN: He says it was impossible to do it.

A It would be a miracle if it was done.

Q BY MR MONAHAN: Have you ever acted as master of any kind of vessel?

A I have landed several boats.

Q Landed?

A Landed them, made a landing, if that's what you are asking for—small ones, not large ones.

Q How small?

A Up to 100 tons, something like that, I suppose.

Q How large was this vessel?

A This vessel was 500 tons, if I remember right, something like that.

Q You say you were on the aft of the ship and all over the stern?

A On the upper deck.

Q All over the upper deck. All right. You testified a few minutes ago she was going full speed astern?

A Yes.

Q How do you know she was?

(Testimony of William O. Brown.)

A Because I could feel her, and my blackboard—

Q Never mind your blackboard. I want your testimony. You testified the vessel was going astern full speed?

A I could feel it.

Q Isn't it a fact that when a ship is going ahead, the least little bit headway, and you reverse your engine, she vibrates like that, like my hand?

A No, sir, that is not a fact.

Q It isn't?

A No, sir.

Q How long have you been going to sea?

A 25 years.

Q Where?

A All over the world. A vessel that backs, there is very little vibration, very little at all. When they first start they will jerk a little, like that, and then just quiet.

Q After she gets astern the vibration ceases?

A No. After the first shot of water goes around the wheel.

Q Did this vessel have considerable vibration?

A Not so much only when she first starts back.

Q You could tell from that first start of vibration she was backing full speed?

A Yes, and I could see the water on the side.

MR MONAHAN: You are a pretty good witness.

MR CRIDER: I think so.

(Testimony of John E. Wahlgren.)

JOHN E. WAHLGREN,

called as a witness on behalf of the respondent, having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR CRIDER:

Q Captain, when you stopped your vessel, after you saw the man in the water, did you back?

A Yes.

Q Just describe your movement after the vessel was stopped? What was done?

A I put the telegraph full speed astern, the moment I know the man was clear of the stern of the vessel. I don't dare to back the vessel uutil I know the man was passed the stern for the reason that if the wheel starts to turn, the propeller I mean, the man is at the suction of the propellers and drag this man underneath the stern and get killed that way. So the minute I noticed, or know the man was astern of the vessel, I starboard my helm to swing the vessel over a little bit and back full speed for the reason, as the chief just testified, there is no boat that you can back straight. When you start to back a vessel full speed astern she wouldn't stop immediately. I could back this boat clean around San Pedro harbor if I have room to do so, but, in this case, between the pipe line, here is 700 feet, and the vessel is 162 feet and I am back there as far as I dare, over there to the Kerckhoff yard, and, of course, I had to stop her and go ahead to not back into the dock, and, in

(Testimony of John E. Wahlgren.)

other words, I couldn't lay there and have this between—in case this boat coming up the channel, I had to let him go. I couldn't blockade the channel in any shape or form. Of course, that was a boat under way, a loaded vessel, a big vessel, which couldn't stop, to stay still until I cleared myself to back around to get to this man where he was overboard.

Q Did you see a man manning the lifeboat there?

A I noticed if anybody is getting the life boat ready but I, particularly, in handling the boat, couldn't personally go back there and superintend this work.

Q, Did you see men working at the life boat?

A Yes, sir, I did.

Q Where were these boats that came up to the point where the man went down the last time when your men ceased working with the life boat?

A The boats were right to the man where he was, the very spot that the man fell overboard. The boats were trying to save this very man and knowing these men were there, before I would ever get my boat ready and get over the side and pull to this particular spot where the man was, that man would be drowned two or three times. I considered those boats was there so far ahead of me that after the man, knowing the man was drowned with these fellows standing around there, there would not be no good of me lowering my life boat and lay around there to watch the man come floating up again. So that's why I said, "We better not lower the boat. We can't save the man. He is drowned."

(Testimony of John E. Wahlgren.)

Q These other three boats, two of them power boats, were scouting all around there at that time?

A Yes.

MR CRIDER: That's all.

CROSS EXAMINATION

BY MR MONAHAN:

Q Now, Captain, was the first mate one of the party helping to get this life boat up?

A I presume he was. As I stated—

Q I don't want your presumptions, Captain, please.

A I couldn't state for sure but as far as I know he was there.

Q Did you not testify a few minutes ago you saw the men at the boat?

A I seen them but I wasn't watching them.

Q Isn't your first mate important enough to know whether he was one of them or not?

A Excuse me, but I am handling the vessel. I don't look at them particularly when I am handling the vessel. I am taking charge of the vessel to move around and trying to get in position so I can get around and go back to this man. I can't stand there as superintendent and look for who is there.

Q As a matter of fact, you don't exactly know what they were doing?

A I know they were there to try to get the boat over. I know one man was there and the second mate. I see them. But who else was there at the time I can't state particularly. I know there were some more men there.

(Testimony of John E. Wahlgren.)

Q How many men did you notice?

A Three or four. Probably more.

Q Now, when you were shoved off from the San Pedro dock you were going about two or three miles an hour?

A I suppose. I say about that.

Q Could you not put your helm to starboard at that time and back the engine full speed?

A I did, sir.

Q And then she backed in, you say, to the Kerckhoff Lumber Company?

A Yes, sir

Q You backed in there?

A Yes, sir.

Q Well now, Captain, why, if that is a fact, is it that you are the only witness who has testified to that fact?

MR CRIDER: I don't think so. The chief engineer just testified.

MR MONAHAN: This is an after thought. After our hand was shown here in my talk.

MR CRIDER: Oh, it might ease your mind to tell you I have known what your hand is right along.

Q Did you not testify this forenoon that there was a large steamer coming up astern?

A Exactly.

Q And that was the reason you continued on instead of backing down to him—you didn't—

A I backed the vessel to get away from the channel so to get the steamer to go by me.

(Testimony of John E. Wahlgren.)

Q To give the steamer room to pass?

A Yes, and in doing so I had to back the vessel up.

Q Did the vessel actually pass you?

A He did.

Q He did pass you?

A Yes, sir.

Q Now, Captain, what duty, if any, did you owe to a vessel behind you, astern of you?

A What duty do I owe?

Q Yes.

A Well, if he gave me a signal to pass and I see fit for him—

Q I am not asking you that. I am asking you what duty, if any, you owe to an overtaking vessel?

A To let him pass if he decides to do so.

Q You do owe that duty?

A I do. If I blow a whistle, if I am coming along, and want to pass another vessel—

Q That is your conception of the inland rules of the road, is it?

A Exactly.

Q All right. Then I am satisfied.

THE WITNESS: If he decided to pass me that is his privilege, that I let him do so.

MR MONAHAN: I have finished with this witness.

REDIRECT EXAMINATION

BY MR CRIDER:

Q You say you backed as far as you could until you came to this wharf?

(Testimony of K. Lind.)

A I did, sir.

Q And then, in order to back more you would have to pull up again?

A Yes, sir.

Q And then back again?

A Yes, sir.

Q And that all takes time?

A You bet.

Q Did you have any conversation with this man Gallagher about this accident—you heard his testimony?

A In the room, when we came over to Blinn's yard I took this Mr Gallagher in the room there to get his name and his address and particulars about it and talk this matter over and asked him what he thought about it. He states to me, "Well, its too bad this thing happened but it happened and everything possible was done to try to save this man." That's all that was said between us.

MR CRIDER: That's all.

K. LIND,

a witness called on behalf of the respondent, having been previously sworn, testified further as follows:

DIRECT EXAMINATION

BY MR CRIDER:

Q You were working at the life boat, were you, there?

A Yes, sir.

(Testimony of K. Lind.)

Q Getting it ready to swing it overboard?

A Yes, getting it ready, getting the covers off, loosening up the covers.

Q What did you do to get that ready?

A I had to clear the halyards, the halyards are generally inside the boat and the cover on the life boat—see? And then we had to get, there is a fore and aft strong-back to keep the cover in position. And I was working at that and the motor boats started to pull over towards the man so the boat would be there before we got out boat over.

Q When you started working on that life boat did you work rapidly or did you work slowly?

A We worked as fast as we could.

Q And when did you cease? That is, when did you stop trying to get the boat ready to put it overboard—where were these other boats?

A The motorboats was half way between the pipe line and the man already—positively.

Q And that was your reason for not putting the boat over?

A Yes, because that man, before we got that boat in the water, that man would be drowned. The motor boat was closer over there than we would get that boat over.

CROSS EXAMINATION

BY MR MONAHAN:

Q You say you had a hauser coiled in the life boat?

A On the port side.

(Testimony of K. Lind.)

Q And that was your working life boat?

A The working life boat.

Q And it was in the skids at the time?

A Yes.

Q And she was secure there?

A She was secure.

Q Secured for sea—that is, having lashings on?

A Yes.

Q You also had the boat cover on?

A Yes.

Q And the boat cover went over the fore and aft strong-back?

A Yes.

Q And it came down and was tied with stops around?

A Yes.

Q Both stops under the keel?

A Yes.

Q That was the position she was in at the time the man fell overboard?

A Exactly.

Q That is very satisfactory. That is absolutely satisfactory to me. You said a few minutes ago you were aft and around that part of the vessel, around the rail when the man, when the boats come around the man in the water?

A Yes.

Q You just testified now that you were lowering the boat or attempting—

A Getting the boat ready, yes.

(Testimony of C. Gibson.)

Q How can you reconcile your being in two places at the same time?

A In two places?

Q Yes.

A Well, the boat is standing in the aft part of the ship and I was aft.

Q All right, that's all.

MR CRIDER: (Addressing Mr Lind) You were not working with the life boat at the time the man fell overboard, were you?

MR LIND: No, I was in the forward part of the ship at that time.

MR CRIDER: You went up to where the life boat was?

MR LIND: Yes.

MR CRIDER: Did you hurry when you went up there?

MR LIND: I did.

C. GIBSON,

recalled, having been previously sworn, testified further in behalf of the respondent as follows:

DIRECT EXAMINATION

BY MR CRIDER:

Q Mr Gibson, did you see this man Gallagher trying to get the life preserver?

A I did. I did see Mr. Gallagher at the life preserver.

Q How was he working?

A He was working it the wrong way. He wasn't

(Testimony of C. Gibson.)

lifting it up. It was supposed to lift up. He was pulling it this way (indicating). There is two iron railings and he would have to break the iron railings or get the iron railings out to get the life preserver. There is a little piece of twine tied on this string. You lift it up and throw it overboard.

Q You break the twine?

A Yes. As soon as you lift it up the twine breaks at the same time. It is not made fast, just temporary. It is easy to break. A kid can break it.

Q You threw it overboard?

A Yes, seen it.

CROSS EXAMINATION

BY MR MONAHAN:

Q What kind of twine was this?

A Sail twine.

Q How many turns?

A Two turns.

Q And that two turns of sail twine—

A —held the line.

Q Held the coil of life line and the life preserver in the case of a heavy sea?

A Doesn't hold the life preserver. The life preserver is inside of the rack.

Q Two turns of this sail twine—

A To break.

Q You pull it with the fingers and it breaks?

A Yes.

Q You pull it up with your fingers and break it?

A Well, with your hand.

(Testimony of C. Gibson.)

Q Pull it up with your hand and you break it?

A Yes.

Q All right. That's good. That's all I want.

MR CRIDER: That's all.

THE COMMISSIONER: I want to hear from both of you. You have put on all your testimony. Have you got any rebuttal?

MR MONAHAN: I will put on Mr Gallagher again, I think.

THE COMMISSIONER: He is not one of the crew.

MR MONAHAN: He was one of the workmen aboard the ship.

MR CRIDER: What was it you wanted? Maybe I will admit it?

MR MONAHAN: That he attempted to take the lifebuoy away and found it tied securely.

MR CRIDER: I will stipulate he would so testify.

I would like, before I close my case, to put in the inspectors reports.

MR MONAHAN: The inspectors report is entirely immaterial.

MR CRIDER: Let me ask him from where he is now (addressing Captain Wahlgren) Captain, is that vessel, with regard to the life buoys and life boats in the same condition that it was in when it was inspected the last time before this accident occurred?

CAPTAIN WAHLGREN: Yes, sir.

MR MONAHAN: I object to that as incompetent,

(Testimony of C. Gibson.)

irrelevant and immaterial; calling for a conclusion of the witness.

THE COMMISSIONER: Overrule the objection.

CAPTAIN WAHLGREN: The boat is inspected once a year and all equipment that is regulation equipment on that vessel for the safety of the vessel, is on the vessel, from one year to another. The life boat is equipped the way the inspector or the rules call for. There is four life boats around the vessel for the safety of the vessel.

MR MONAHAN: Four?

CAPTAIN WAHLGREN: Life buoys. And two life boats, sufficient enough to handle the crew. That is the inspection law.

MR CRIDER: The same equipment was on at the time it was inspected, the last time before the accident, that was on at the time of the accident?

CAPTAIN WAHLGREN: Yes, sir.

THE COMMISSIONER: I will continue the matter until tomorrow morning in order that you may decide what vou want to do—whether you want to submit the matter on briefs or oral argument.

MR MONAHAN: Have you rested?

MR CRIDER: Yes, except I want to introduce the reports of the inspectors.

THE COMMISSIONER: The matter will be continued until 10 o'clock tomorrow morning.

(Whereupon an adjournment was taken until 10 o'clock a. m. December 2, 1922.)

LOS ANGELES, SATURDAY, DECEMBER 2, 1922. 10:15 A. M.

MR. CRIDER: As I understand it, Mr. Monahan is willing to stipulate that the United States inspectors made an inspection of this boat before the accident happened—it has been testified that that was in December, before this accident happened—and at that time the boat Brunswick was equipped with all necessary appliances, life buoys, life boats, guards, rails, lines, and so forth, as required by law and by the regulations in the Statutes of the United States. I understand you are willing to stipulate to that, Mr. Monahan?

MR. MONAHAN: Yes. I am willing to stipulate that at the last time she was inspected by the local inspectors, if she wasn't fully equipped, they would, in the performance of their duties, compel her to be so equipped; and we will assume that she was fully equipped at that time.

MR. CRIDER: Then your stipulation means that at that time she was equipped as required by law?

MR. MONAHAN: Yes; at the last inspection, whatever time that was. Well, I didn't say life rails. The local inspectors haven't anything to do with those. You can build a ship in any manner that you like.

MR. CRIDER: All right, then. Your stipulation covers life buoys, life boats—

MR. MONAHAN: And other equipment required by statute.

MR. CRIDER: Referring to the time immediately

after the accident, a day or so after the accident, an inquiry was held, and that it was so equipped at that time.

MR. MONAHAN: No. On mature deliberation, I cannot stipulate to that for this reason: the local inspectors have no authority to do anything beyond—or are you speaking about the equipment of the vessel at that time?

MR. CRIDER: Yes.

MR. MONAHAN: Yes. I will stipulate also the local inspectors found her fully equipped at some kind of an inspection they had after the subject-matter of this libel arose.

THE COMMISSIONER: Can you fix a date at which that inspection was made?

MR. MONAHAN: Sometime shortly after April 18 last.

MR. CRIDER: Within a day or so after, Mr. Monahan?

MR. MONAHAN: Yes. That she was fully equipped?

MR. CRIDER: Yes. I would also like to offer the findings of the United States local inspectors, that is, the findings giving the result of their investigation of this accident, which I have here.

MR. MONAHAN: I object to that on the ground the local inspectors have no judicial authority to inquire into anything beyond the equipment of the ship as provided for by statute, and that, it having been conceded the vessel was fully equipped, the subject-matter of their inquiry is entirely irrelevant and immaterial, and has no bearing on the issues here.

THE COMMISSIONER: I will sustain the objection as not being the best evidence. However, it may go into the record for the purpose of preserving the record on review.

MR. CRIDER: Your Honor, may I ask that the Reporter copy this, and let the gentleman have it back?

THE COMMISSIONER: It may be copied in the record.

MR. CRIDER: Mr. Reporter, will you copy this, please?

(The following is the matter so requested to be copied:)

TRIPLICATE

File No. 981. S.I.G.No.

Report of Casualties and Violations of Steamboat Laws.

Name of Vessel	Brunswick-Freight steamer.
Name of Officer	John E. Wahlgren, Master.
Local District	Los Angeles, Cal.
Date of Report	May 8, 1922.
Date of Casualty or Violation	April 18, 1922.
Nature of Casualty or Violation	Accidental drowning.
Action Taken	Case investigated and dismissed.
Number of Lives lost	One.

Form 924-A.
Department of Commerce.
Steamboat-Inspection Service. 11-45-77

REMARKS:

While vessel was proceeding from dock at San Pedro to dock at East San Pedro about 8:05 a.m., John Hoeffner, an American, 38 years of age, married, who boarded the vessel to work as a longshoreman, accidentally fell overboard while engaged in pulling a sling around a load of lumber being prepared for discharging upon arrival at dock. Vessel was immediately stopped and crew made ready to launch lifeboat but was not considered necessary as two launches and a skiff, being in the vicinity, went to his assistance. A life buoy was thrown to him from one of the launches, which he did not grasp, and, being unable to swim, he disappeared before assistance could be given further.

The body was found some eight days later, and coroner's jury brought in a verdict of accidental drowning. Case was investigated on April 20 and May 6, 1922, on which latter date testimony was taken from those connected with the vessel which just arrived in port.

No blame was attached to any of the licensed officers of the vessel for the mishap, and the case was, therefore, dismissed.

(Signed) S. A. Kennedy, Jr.
Carl Lehners.
United States Local Inspectors."

MR. CRIDER: That will close our testimony, your Honor. I would like at this time to ask permission to file an amendment to my answer in the case, setting forth contributory negligence, and alleging a little

more in detail the special defense, in order to conform to certain of the proof.

MR. MONAHAN: You want to set up an affirmative plea of contributory negligence on the part of the libelant, is that it?

MR. CRIDER: Yes, Mr. Monahan.

THE COMMISSIONER: And you also asked the privilege of filing an amendment to the libel, asking for exemplary damages.

MR. MONAHAN: To conform to the evidence.

THE COMMISSIONER: Permission is granted for both of you to file your amendments. Mr. Monahan may file his amendment to the libel and Mr. Crider may also file his amendment to the answer.

MR. CRIDER: Yes. It is not for the purpose of bringing forth any new matter, but to make it conform a little more to the proof.

MR. MONAHAN: I will stipulate now, may it please the Court, that we may proceed with our argument, and that the Master consider an affirmative plea of contributory negligence is filed with the Court, and we will proceed to close the case as if this affirmative plea of contributory negligence were filed. Is that right?

MR. CRIDER: Yes; but I should like, however, to submit this case on briefs. It is an important matter.

THE MASTER: I want to ask a few questions. What was the age of this man? I don't recall the evidence. What was the evidence as to his age?

MR. CRIDER: What was his age, Mrs. Hoeffner?

MRS. HOEFFNER: He was 35 years old. He was born in 1885.

MR. CRIDER: That would make him more than 35. 38, that would be.

MR. MONAHAN: 37, he would be now. What day was he born?

MRS. HOEFFNER: October 20.

MR. MONAHAN: So this October he would be 38, and he was 37 years old last October. He was drowned in April.

THE COMMISSIONER: And he would have been 37 in October?

MR. MONAHAN: The following October; that is it.

THE COMMISSIONER: There was another witness who testified, Mr. Gallagher. Is he here this morning?

MR. MONAHAN: Mr. Gallagher went on the stand to rebut testimony, and it was stipulated by and between the proctors that he would testify that nobody on the vessel—

MR. CRIDER: Now wait a minute. He testified the same as this man Johannsen.

THE MASTER: The main thing I wanted to know was whether he testified or not to the throwing of the lifeline.

MR. MONAHAN: It was stipulated that he would so testify. The witnesses who would testify the same as Johannsen were the absent witnesses who were not here; but I put Mr. Gallagher on the stand for that purpose.

MR. CRIDER: Yes, that is true, that he would testify that there was no lifeline thrown.

THE COMMISSIONER: That is my recollection. And did you say that the other two witnesses, whose

testimony you stipulated, would be cumulative, would be along that same line?

MR. CRIDER: No, indeed.

MR. MONAHAN: That they would be just along the line of Johannsen and Durant.

MR. CRIDER: Well, as Johannsen.

THE COMMISSIONER: All right. Do you want to argue it orally, or submit it?

MR. CRIDER: I would rather submit it on briefs.

THE COMMISSIONER: Or do you want to have a partial oral argument and then submit it?

MR. MONAHAN: If he wants to submit it on briefs, I will be verv glad to do it; but I wish I had known of it last night.

THE COMMISSIONER: Then the matter is submitted, is it?

MR. MONAHAN: Yes.

THE COMMISSIONER: What time do you want on your briefs?

MR. MONAHAN: I would say, while the matter is fresh in the Master's mind, let each one submit a brief and rest with that, and submit it, say, in three days.

MR. CRIDER: Oh, not three days, Mr. Monahan. That is not sufficient time.

THE COMMISSIONER: How would five, five, and five be?

MR. CRIDER: I would like to have the testimony read to your Honor, and I imagine that would take three or four days to do that. I don't like to rely entirely on my memory to those things.

THE COMMISSIONER: Are you going to have the testimony written up?

MR. CRIDER: Yes.

THE COMMISSIONER: I would like to see the testimony myself.

MR. CRIDER: I will let you have my copy, if you desire.

THE COMMISSIONER: Say five, ten, and five.

MR. MONAHAN: But I don't want ten days.

THE COMMISSIONER: Well, I will make it five for Mr. Monahan and ten days in which to reply, and Mr. Monahan five to respond, if he so desires.

MR. CRIDER: I think that ought to begin from Monday, though, your Honor.

THE COMMISSIONER: That will be the order, five, ten, and five, dating from Monday.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

(Before Hon. Stephen G. Long, U. S. Commissioner.)

CHRISTINA M. HOEFFNER, as Administratrix of the Estate of John H. Hoeffner, deceased, Libelant,	)	No. 1157.
vs.	)	
NATIONAL STEAMSHIP COMPANY, Respondent.	)	

REPORTER'S TRANSCRIPT OF TESTIMONY AND PROCEEDINGS.

Los Angeles, California, December 1 and 2, 1922.

[Endorsed]: FILED APR 16 1923 CHAS. N. WILLIAMS, Clerk By R. S. Zimmerman

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

CHRISTINA M. HOEFFNER, as Administratrix of the Estate of JOHN H. HOEFFNER, Deceased.	)	Civil No. 1157.
Libellant,	)	ASSIGNMENT
vs.	)	OF ERRORS.
NATIONAL STEAMSHIP COMPANY,	)	
Respondent.	)	

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COMES NOW the Libellant and assigns the following specifications of error as against the final decree of the court in the above entitled matter.

I.

That the Court erred in finding that the deceased was not precipitated overboard immediately upon getting to his working position, in this, that it appears from the evidence in this proceeding that the vessel was under way when the mate ordered the deceased to take his position upon the lumber and be prepared to sling the same, and at the time the Libellant was precipitated into the water the vessel had not proceeded much more than one ship's length on its course, and that from the said condition it is apparent that the deceased had only time to go to and ascend the lumber pile and had no time to determine the unsafe condition of his working position.

II.

The Court erred in holding that the finding of the Commissioner "that the place where the deceased was ordered to work, because of the condition specified, was a dangerous one" to be obviously irrelevant and entirely immaterial for the reason that before an employe can be held to have accepted his employment with the dangers incident thereto, he must have an opportunity to acquaint himself with those dangers and wherein they exist, and in the case at bar he had no such opportunity and the finding of the Commissioner is therefore not irrelevant.

III.

The Court erred in holding that the proctor for Libellant is in error in bringing *our* and the Commissioner likewise to have erred in considering the examination in relation to the seamanship of the officers and crew of the vessel for the reason that the laws of Congress require certain conditions to exist in life-saving equipment upon a vessel and the matters concerning which the officers and crew are show that they had not complied with these conditions.

IV.

The Court erred in its finding that the respondent's failure to provide life-lines, or other protection, around the top of the deckload of lumber, with the vessel under way, did not constitute negligence, for this reason, that negligence is a question of fact and the ordering of a man into a dangerous working position without the protection suggested, especially on board a vessel under

way in a narrow channel, was negligence on the part of the vessel.

V.

The Court erred in holding the deceased was precipitated overboard from the Brunswick because of his own contributory negligence in this, that the evidence does not show that the deceased had any opportunity to acquaint himself with the dangers of the position in which he was placed and not knowing the dangers of the position, he could not contribute to his own injury by acting therein.

VI.

The Court erred in its conclusion and holding that the waters of the channel rapidly carried the deceased beyond the stern of the ship, for the reason that the wash at the stern of the ship was caused by the revolution of the ship's propellor in displacing water and was due to its operation.

VII.

The Court erred in holding that the Captain of the Brunswick stopped that vessel with all celerity he could command in view the circumstances, for the reason, that in the testimony of the Captain himself, he disclaimed any intention to stop the vessel immediately for, as he testified, he could not blockade the channel because another (overtaking) vessel was coming up behind him.

VIII.

The Court erred in holding that the respondent's vessel Brunswick could not be stopped immediately on account of the fact that an overtaking vessel had to be

taken into consideration, for the reason and on the ground that there is no rule of navigation, and no rule of law, requiring an overtaken vessel to give way to an overtaking vessel, especially in an emergency of "a man overboard," and there is no evidence to show that there was an overtaking vessel in such a position that it could not be warned by usual signals of the maneuvers intended to be taken by the Brunswick and of the emergency of "man overboard."

IX.

The Court erred in holding that the inland rules of the road were inapplicable where a vessel, the one being overtaken, is compelled because of emergency arising to change its normal course of procedure and either stop, or turn around, or make any other maneuver, as there is no evidence of the existence of any exigency which would have prevented *to* Brunswick from following the ordinary rules of the road and reversing her engines in the event that it became necessary to stop on account of the existence of any unexpected condition, such as that of a man overboard. There is no rule of seamanship that requires a vessel to use more care for the protection of the vessel than for the protection of human life.

X.

The Court erred in holding that there was any duty under the conditions that existed there for the Brunswick to continue on her way without taking the ordinary care of saving the life of the man overboard.

XI.

The Court erred in holding that because of the fact that there were two or three power boats on the water in the vicinity of the vessel that the vessel had any right to rely upon their services in saving the life of the man overboard.

XII.

The Court erred in holding that the supposed fact that there were others able to act more quickly than those on the Brunswick that therefore the Brunswick was excused from proceeding to save the life of the man overboard and there is no evidence to show that the other boats were in a position to respond more quickly than the respondent's vessel.

XIII.

The Court erred in not considering the fact that there was loose lumber upon the decks of the Brunswick and that in a second of time the same could have been passed into the water immediately at hand for the deceased while in the water and that his life could thereupon have been saved and that the vessel, respondent in this case, failed to render such assistance to the deceased overboard.

XIV.

The Court erred in holding that the finding of the Commissioner that the respondent failed to respond to, provide and maintain in a reasonably fit and proper condition sufficient lifesaving appliances on board of the Brunswick was erroneous. In this that it appears from the evidence of respondent's witnesses that there twere only two life boats on board respondent's ship

Brunswick. The deceased fell overboard from the starboard side of that vessel, and the port boat was the best to get over (launched) and that this port life boat had boat cover on and securely fastened under its keel, the boat itself was securely lashed and had a hawser (the smallest being 5″ in circumference and 120 fathoms in length) coiled inside, and that the lines (boat falls or purchase tackle) were wrapped around the boat davits; that there were but four ring-life buoys on board and these were all stowed at the stern of the ship, and, according to the testimony of Gallagher, who spent six minutes in trying to get the life buoy adrift, was securely tied by a square knot to the rail, which when wet is very difficult to untie.

XV.

The Court erred in holding that the Brunswick was not negligent in regard to its life-saving apparatus for the reason that such life-saving apparatus was on board of the vessel as the spirit of the law requires, and that they should not only be on board but should be there in a position and condition to be used instantly when the call therefor arises, and the mere fact that all of the equipment required by law was upon the Brunswick at the time of the occurrence in question, but was not in a usuable condition, does not excuse the respondent vessel from negligence in the matter.

XVI.

The Court erred in holding that the actions of the longshore man who was to work with the deceased on the vessel constituted him a partner of the deceased,

or in any manner cast upon him any responsibility, unless ordered so to do, of throwing a life-preserver to the deceased, and the evidence fails to show that such alleged partner had any knowledge of how to release a life-preserver, or that the life-preserver in question was so arranged as to easily be released as required by the shipping laws, and that it was in a position to be released instantly, and the fact that one of the sailors ran up and released it without difficulty does not excuse the vessel from negligence because the evidence shows that Gallagher had untied the knot which secured it to the rail by that time and because it does not show that the sailor who released it used it for any beneficial purpose whatsoever, as there is a question of fact as to whether he even threw it into the water.

XVII.

The Court also erred in finding that there was a likelihood that the alleged partner of the deceased prevented the sailors from acting more promptly in the matter, as the evidence fails to show it and therefore it is error to found any reason thereon why judgment should go for the respondent.

XVIII.

The Court errs in finding this, "that there is no testimony from which it might reasonably be inferred that if exercising reasonable care and promptitude a life-preserver had been thrown to the deceased he might have been able to have taken advantage of it and saved his life," for it is a matter of universal presumption that if anything is presented to a man in the water on which he could sieze hold, it is natural

for him so to do and it must therefore be presumed that had a life-preserver or a stick of lumber been cast in the way of the deceased he would have saved himself.

XIX.

The Court erred in its conclusions as follows: "The deceased having fallen overboard, due to his own negligence, no recovery should be had as against the respondent unless at least it should be proven to the degree required by law, that the loss of his life thereafter was due to the neglect, want of care, and culpability of the servants of the respondent," for the reason that it is apparent from the evidence in the case and from the matters which under the law the Court must take judicial notice of that had the respondent and its servants acted promptly under the circumstances the life of the deceased would have been saved.

XX.

The Court erred in reversing and overruling the findings of the Commissioner in relation to the evidence introduced before him on the well-known ground and for the reason that the Commissioner had before him the witnesses who testified and observed their demeanor and was in a better position to determine what evidence should be accepted and what rejected in reaching a conclusion than was the Court to whom this evidence was presented, and this especially in view of the stipulation of the parties and the order of reference made in pursuance thereof.

XXI.

Finally the Court erred in sustaining the exceptions filed to the Commissioner's report, and instead of overruling the findings of the Commissioner, the same should have been sustained and a judgment ordered for the Libellant, as prayed for and as found by the Commissioner.

WHEREFORE, Libellant prays that the ruling of the Court be vacated and set aside and that the findings of the Commissioner may be sustained in this matter.

John J. Monahan,
Proctor for Libellant and Appellant.

Endorsed (ORIGINAL) No. 1157 Dept. In the District Court of the United States In the Southern District of California Southern Division. CHRISTINA M. HOEFFNER as Administratrix of the Estate of JOHN H. HOEFFNER deceased Libellant vs. NATIONAL STEAMSHIP COMPANY, Respondent. ASSIGNMENT OF ERRORS. Received copy of within this 30 day of July 1924 Joe Crider Jr. Attorneys for Respondent. John J. Monahan 212 W. Sixth St. San Pedro, California Phone 1166J Attorneys for Libellant. FILED JUL 30 1924 CHAS. N. WILLIAMS, Clerk By L. J. Cordes Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION (IN ADMIRALTY)

CHRISTINA M. HOEFFNER, as Administratrix of tht Estate of John H. Hoeffner, deceased.
Libellant and Appellant,
vs.
NATIONAL STEAMSHIP COMPANY
Respondent and Appellee.

No. 1157 Civil
NOTICE OF APPEAL

Please take notice that the libellant, Christina M. Hoeffner as Administratrix of the Estate of John H. Hoeffner, hereby appeals from the final decree made and entered herein on the 4th day of February, 1924, and from each and every part thereof, to the next United States Circuit Court of Appeals for the Ninth Circuit, to be holden in and for said Circuit, at the City of San Francisco, State of California.

To: The National Steamship Company, respondent and Joe Crider, Jr., Esq., proctor for Respondent.

Charles N. Williams, Esq., Clerk.

Dated San Pedro, California July 21st, 1924.

John J. Monahan
Procotr for Libellant and appellant.

Endorsed (ORIGINAL) No. 1157 Dept..... In the District Court of the United States In the Southern District of California Southern Division. CHIRSTINA M. HOEFFNER, as Administratrix of the Estate of John H. Hoeffner, deceased, Libellant

and Appellant NATIONAL STEAMSHIP COMPANY, Respondent and Appellee. NOTICE OF APPEAL Received copy of within copy of Notice of Appeal this 30 day of July, 1924, Joe Crider, Jr., Attorneys for defendant. John J. Monahan 212 W. Sixth St San Pedro, California Phone 1166J FILED JUL 30, 1924, CHAS. N. WILLIAMS, Clerk, by L. J. Cordes, Deputy Clerk, Attorneys for Libellant and Appeallant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION (IN ADMIRALTY)

CHRISTINA M. HOEFFNER as Administratrix of the Estate of John H. Hoeffner, deceased. Libellant and Appelant. vs. NATIONAL STEAMSHIP COMPANY, Respondent and Appellee.	No. 1157 Civil NOTICE OF FILING BOND ON APPEAL

Gentlemen:

Please take notice that the Bond on Appeal herein has been this day filed in the office of the Clerk of the District Court of the United States for the Southern Disrict of California, and executed and given by The National Surety Company, New York, and duly authorized to transact a general Surety Business in the State of California.

Yours truly,
John J. Monahan
Proctor for Libellant.
and Appellant

To National Steamship Company
Respondent and appellee and
to Joe Crider, Jr., Esq., their
proctor.

Endorsed. (Original) No. 1157 Dept. ....In the District Court of The United States In the Southern District of California, Southern Division. CHRISTINA M. HOEFFNER, as Administratrix of the Estate of John H. Hoeffner, deceased, Libellant and Appellant, NATIONAL STEAMSHIP COMPANY, Respondent and Appellee Defendant NOTICE OF FILING BOND ON APPEAL. Received copy of within copy of Notice of Filing Bond on Appeal this 30 day of July, 1924 Joe Crider Jr. Attorneys for Defendant. John J. Monahan 212 W. Sixth St. San Pedro, California Phone 1166J. FILED JUL 30 1924 CHAS. N. WILLIAMS, Clerk By L. J. Cordes, Deputy Clerk Attorneys for Libellant and Appellant.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA? SOUTHERN DIVISION

Christina M. Hoeffner, Executrix of the Estate of John H. Hoeffner, Deceased, Vs. National Steamship Company	UNDERTAKING FOR COSTS ON APPEAL Case No. 1157

WHEREAS, the Plaintiff in the above entitled action is about to appeal to the Circuit Court of Ap-

peals for the Ninth Circuit from a judgment and decree entered against her in said action in the United States District Court for the Southern District of California Southern Division, in favor of the Defendant in said action, on the 4th day of February A D 1924, for Dollars and
Dollars cost of suit.

NOW THEREFORE, in consideration of the premises and of such appeal the undersigned National Surety Company, a corporation organized and existing under the laws of the State of New York, and duly authorized to transact a general surety business in the State of California, does hereby undertake and promise on the part of the Appellant that said Appellant will pay all damages and costs which may be awarded against her on the appeal, or on a dismissal thereof, not exceeding TWO HUNDRED FIFTY ($250.00) DOLLARS, to which amount it acknowledges itself bound.

IN WITNESS WHEREOF, the said Surety has caused these presents to be executed and its official seal attached by its duly authorized Attorney in Fact at Los Angeles, California, the 15th day of July A D 1924

NATIONAL SURETY COMPANY

BY J. Paul Kiefer

ATTORNEY IN FACT.

The premium charged for this
bond is $10.00 Dollars per annum.

Examined and recommended for approval as provided in Rule 29.

John J. Monahan
ATTORNEY

(Seal)

STATE OF CALIFORNIA)
COUNTY Los Angeles)ss.:

On this 15th day of July, in the year 1924, before me Edna Orcutt, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn personally appeared J Paul Kiefer, known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of the NATIONAL SURETY COMPANY, a Corporation, and acknowledged to me that he subscribed the name of the NATIONAL SURETY COMPANY thereto as Principal and his own name as Attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) Edna Orcutt
Notary Public in and for said County and State. My Commission expires Jan. 6th 1927

F. 2393 5M 8-22

Endorsed No. 1157 Dept ..... In the District Court of the United States In the Southern District of California Southern Division. CHRISTINA M. HOEFFNER; as Administratrix of the Estate of John H. Hoeffner, deceased, Libellant and Ap-

pellant. NATIONAL STEAMSHIP COMPANY; Respondent and Appellee Defendant BOND FILED JUL 30 1924 CHAS N WILLIAMS, Clerk By L J Cordes Deputy Clerk John J Monahan 212 W. Sixth St. San Pedro, California Phone 1166J Attorneys for Libellant and Appellant. E. R. B.

UNITED STATES OF AMERICA
District Court of the United States
SOUTHERN DISTRICT OF CALIFORNIA

Hoeffner	)	
Libellant,	)	CLERK'S OFFICE
vs.	)	No. 1157
National Steamship Co.	)	PRAECIPE
Respondent.	)	

TO THE CLERK OF SAID COURT:

Sir:

Please issue Libel, Claim of National Steamship Company, claim and answer, amendment to libel, commissioner's report, exceptions to report, petition for rehearing, amendment and addition to exceptions to commissioners report, minute order sustaining exceptions to commissioners report, final decree opinion, reporter's transcript of testimony, assignment of errors and notice of appeal and bond.

John J. Monahan
Proctor for libellant
and appellant.

Endorsed FILED JUN 27 1924. CHAS. N. WILLIAMS, Clerk by R S Zimmerman, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

CHRISTINA M. HOEFFNER, as Administratrix of the Estate of JOHN H. HOEFFNER, Deceased.	)	Civil No. 1157.
Libellant,	)	
vs.	)	
NATIONAL STEAMSHIP COMPANY,	)	
Respondent.	)	

CLERK'S CERTIFICATE.

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 247 pages, numbered from 1 to 247 inclusive, to be the Transcript of Record on appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the libel, claim of National Steamship Company, claim and answer, amendment to libel, commissioner's report, exceptions to report, petition for rehearing, amendment and addition to exceptions to commissioners report, minute order sustaining exceptions to commissioner's report, final decree and opinion, transcript of the evidence, assignment of errors, bond, notice of appeal and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on appeal amount to
and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this day of August, in the year of our Lord One Thousand Nine Hundred and Twenty-four, and of our Independence the One Hundred and Forty-ninth.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.
By

Deputy.

No. 4308.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Christina M. Hoeffner, as Administratrix of the Estate of John H. Hoeffner, Deceased,

Appellant,

vs.

National Steamship Company,

Appellee.

BRIEF FOR APPELLANT.

JOHN J. MONAHAN,
Proctor for Appellant.

Parker, Stone & Baird Co., Law Printers, 232 New High St., Los Angeles.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Christina M. Hoeffner, as Administratrix of the Estate of John H. Hoeffner, Deceased,

Appellant,

vs.

National Steamship Company,

Appellee.

BRIEF FOR APPELLANT.

PRELIMINARY STATEMENT.

August 29, 1922, appellant, Christina M. Hoeffner, as administratrix of the estate of John H. Hoeffner, deceased, filed a libel *in personam,* in the District Court of the United States, in and for the Southern District of California, Southern Division, against the National Steamship Company, owner of the Steamship Brunswick, for $20,000.00 damages, for death by wrongful act of her late husband, the aforesaid John H. Hoeff-

ner, who, while employed on board said ship Brunswick as a longshoreman, was precipitated overboard therefrom and was drowned in Los Angeles harbor on April 18, 1922.

September 2, 1922, respondent filed its claim and answer.

November 6, 1922, the court, by stipulation of the parties, and in pursuance thereof, made an order of reference in the above entitled matter directing United States Commissioner Stephen G. Long to take testimony, make findings of fact and recommend appropriate conclusions of law, and judgment and decree.

December 1 and 2, 1922, pursuant to above mentioned order of reference, testimony was taken by said U. S. Commissioner Stephen G. Long, all witnesses appearing before him personally, at the Federal building, Los Angeles, the libellant being represented by her proctor, John J. Monahan, and the respondent by Joe Crider, Jr., Esq. Case submitted on briefs.

December 2, 1922, at the close of the testimony, it was stipulated between respective proctors, and agreed to by the commissioner, that respondent file amendment to his answer, setting up an affirmative plea of contributory negligence, and that the testimony be considered with that plea before the commissioner. At the same time leave was granted libellant to file amendment to libel asking for exemplary damages, and on December 14, 1922, libellant filed amendment to libel and asked for $5,000.00 exemplary damages.

February 26, 1923, commissioner's report in above entitled matter was filed.

March 10, 1923, respondent filed exceptions to commissioner's report.

March 12, 1923, respondent filed petition for rehearing and re-reference.

April 2, 1923, respondent filed amendment to exceptions to commissioner's report.

Commissioner's report argued orally and submitted to court, Honorable Benjamin F. Bledsoe, on briefs.

November 30, 1923, court filed opinion sustaining exceptions to commissioner's report, and referring matter to the commissioner for a new hearing or for such other action as by the parties may be deemed appropriate.

Libellant having failed to take any further action, February 4, 1924, final decree, sutaining exceptions to commissioner's report, and dismissing libel, was filed.

July 30, 1924, notice of appeal, bond, and assignment of errors filed, and appeal perfected.

STATEMENT OF THE CASE.

Substance of the Libel.

I. The libellant, Christina M. Hoeffner, as administratrix of the estate of John H. Hoeffner, deceased (her late husband), filed a libel *in personam* against the National Steamship Company, owner of the Steamship Brunswick.

II. Libel alleged that John H. Hoeffner was employed by the master of the steamship Brunswick as a longshoreman to assist in unloading (lumber) cargo of that vessel, and that on April 15, 1922 (correct date April 18, 1922), while so employed in making up sling loads of lumber, said vessel got under way, and proceeded upstream, and while so engaged and while ship was proceeding upstream, as aforesaid, the sling yielded a little so that he tripped and fell overboard; that there were no life lines, or life rails on side of vessel where deceased was working, so that he could be protected; that said vessel negligently continued on her way after deceased was precipitated into the water, and that she proceeded about 500 feet up stream before stopping; that no lifeboat was lowered to pick up deceased, and that there were no life buoys thrown and no effort was made, either by the master or crew of said vessel, to save the deceased, and that as a result thereof the deceased came to his death by drowning.

III. That in disregard of their duty to furnish, keep and maintain, a safe, sufficient and suitable place for said John H. Hoeffner to work in and to perform said labor, and to provide competent, capable and skillful seamen for the manning of said vessel, and to provide and maintain suitable, sufficient and safe appliances for said seamen to perform their respective duties in the management of said vessel, and also with respects to the saving of men that are thrown overboard, said respondent had knowingly, carelessly and

negligently failed to provide life rails or lines on that part of the deck where the said John H. Hoeffner was employed at the time of said accident, and had knowingly, carelessly and negligently employed seamen who were not skillful in the manning and lowering of the life boat, or the throwing out of life lines or life buoys for the rescue of said John H. Hoeffner, and who were unskillful in the stopping of the vessel, or giving of signals for the stopping of vessels for the picking up and rescuing of said John H. Hoeffner.

IV. The libel also alleged that the libellant was, and is, the duly qualified and acting administratrix of the estate of John H. Hoeffner, deceased.

V. That said John H. Hoeffner, left surviving him as his only heir, Christina M. Hoeffner, his widow, who was dependent upon him for support, and that before his decease the said John H. Hoeffner was able to secure continuous employment at his vocation as a longshoreman, and received therefor the sum of $200.00 per month; that were it not by reason of said death, caused by acts of said respondents, said John H. Hoeffner would now be able to earn said sum of $200.00 per month, and that by reason of said death, caused by said acts of respondents, the libellant, the said Christina M. Hoeffner, has been injured in the amount of $20,000.00.

Answer.

Respondent in his answer admitted that at all times mentioned in the libel he was the exclusive owner of the steamship Brunswick, and specifically denied all other material allegations thereof.

Amendment to Libel.

Upon leave duly had by the court, the libellant filed amendment asking for the sum of $5,000.00 as exemplary damages.

Amendment to Answer.

No amendment to answer was in fact filed, but it was stipulated by and between the proctors that the case be submitted for the consideration of the commissioner and court, as if actually filed, whereby respondent set up affirmatively the plea of contributory negligence.

IMPORTANT EVIDENCE.

1. First Mate Ordered Deceased to Sling Up Lumber After Vessel Got Underway.

Q. What is your duty as a first mate regarding the loading and unloading of the vessel? A. Superintend the working, looking after the charge of loading, and unloading of the vessel.

Q. Was John H. Hoeffner employed on the vessel on the 18th day of April last? A. Yes, sir.

Q. After leaving the San Pedro Lumber Company's docks or at any time, about 8 o'clock in the morning,

did you give the deceased any orders? A. Yes, I gave him orders.

Q. What orders did you give him? A. I gave him orders to, I told him to start to sling up the lumber, get the sling ready.

Q. What time was this, about? A. Just about two or three minutes past eight.

Q. Were you under way at that time? A. Yes, sir. [Apostles, p. 111.]

Mr. Hoeffner came to me and said, "I'll work partners with you." I said, "Very well."

Q. Is this Mr. Hoeffner, the deceased in this case? A. Yes. At that, the mate told us to go on to work. I looked at the clock in the wheelhouse. It was exactly three minutes after 8. We went forward, which I would call, well, the forward end of the ship, to prepare the loads of lumber that was to be discharged at Blinn's, which consisted of redwood. I consider the planks about 2 by 12 and about 25 to 30 foot long. They were about 6—well, between 5 and 6 high, with a double plank, which meant about 12 inches high and about 24 inches wide. I went forward, and I got a sling, to the poop deck. There was some slings on the poop deck, that is, at the end of the lumber where the winch-driver and a man,—I forgot whether the mast stands fore or aft—yes, it stands forward, the mast, I am pretty sure. And I unloosened one of these slings and took it down and stuck in under the lumber pile, the load we had already prepared. That is, it was prepared. We didn't prepare the loads. The loads were all prepared, that was laying on the top of the deck. I shoved the sling under and where the splice connects on the string, there was threads on that splice which was hard to get through; so he leans over the

load and pulls it with his hand, and he gets it pretty near through. I said, "We will pull the sling back to get it in the center of our load." Well, in doing so, he couldn't get it back. So he stood on top of his load, exactly like that (illustrating), and he reached down to get hold of the sling and give a pull, and the board he was standing on turned, and he slipped right off back, that is, facing the ship with his back towards the water. At that time the winch-man, he hollered, "Man overboard!" Gallagher. [Apostles, pp. 166 and 167.]

2 Deceased Had to Go on Top of Unprotected Lumber Pile About Nine Feet High While Vessel Was Under Way.

Q. Seaman Nagel. Anything else come under your observation? A. Well, the only thing I recollect, when these two men were putting on the sling, this man, of course, he couldn't go on the outside of this load of lumber he had piled on that sling, because this particular load of lumber was piled right on the edge of the deck-load, which is the extreme side of the ship, also the bulwarks, and he couldn't get the sling, he stood on top of the deck-load trying to pull this particular sling through there, and there was the top plank, it was a heavy plank, if I am not mistaken, a 3 by 12 redwood plank, approximately something like 18 or 20 feet long and very heavy plank, and one plank I noticed at the particular time when the man tried to put the sling on, it wasn't exactly right in place, that is, it was leaning at a slant, it was tipped; and when he stepped on there, I couldn't tell exactly how many inches the block was that they built the load on because I knew they had some job in getting the sling over,

I mean towards the middle of the load, and I know the second time I saw him,—I saw him the first time when the plank tipped, and I felt even myself it wasn't a safe proposition, but he slipped a second time, and the plank tipped again and he overbalanced himself and went overboard.

A. Well, the sling was on top of the deck-load, and the deck-load, according to my estimation, is about 9 feet, or in the neighborhood of 9 feet, above the deck itself. [Apostles, pp. 145 and 152.]

Q. First Mate Lind. Did you have any railing around the part of the ship where the deceased was working or did you have life lines there? A. No, there was nothing at all there. [Apostles p. 111.]

Q. As a matter of fact, there are no rails or life lines on the outward part of the vessel where the deck load is carried? A. When she is loaded or in the harbor there is not.

Q. No rail or life line there? A. Around the deck load in the harbor, no.

Q. That is the part where the deceased fell overboard? A. Yes.

Q. And there is no rail or life lines there? A. No.

3. The Brunswick Did Not Stop When the Cry of Man Overboard Was Raised.

A. The master of the ship * * * and of course, I had to stop her and go ahead to not back into the dock, and, in other words, I couldn't lay there and have this between * * * in case this boat coming up the channel, I had to let him go. I couldn't blockade the channel in any shape or form. Of course that was a boat underway a loaded vessel, a big vessel,

which couldn't stop, to get this man where he was overboard. [Apostles pp. 213-214.]

A. Gallagher. * * * And the board he was standing on turned, and he (deceased) slipped right off back, that is, facing the ship with his back towards the water. At that time the winchman, he hollered, "man overboard," I looked over the side. The ship was going * * * I ran aft to where the life buoy was on the starboard side. I would call it the starboard beam, that is, the stern, and it was fastened on to the rail. There was, well, a line, it is onto the life buoy, I think it is about half inch, to my judgment a half inch line. That line had the life buoy tied to the guard rail, called a slat knot on it; a flat knot on it, a square knot is what the sailors say, and that line was wet. I tried to get that line loose, and I worked on it. Again the time I did that, we were three ship lengths away from the man in the water. [Apostles, pp. 167-168.]

Q. Were you in a position, or, if in position, did you notice whether or not the Brunswick stopped after the man went overboard? A. No, sir; not until the man sank.

Q. Now, do you know whether or not the engines backed? (Discussion.)

The Commissioner: Do you know whether it backed or not? A. No, sir.

Q. You mean you don't know? A. I know that she didn't back.

Q. How could you tell from where you were standing (extreme stern) whether or not the engine of the Brunswick backed or not? A. You can tell by the vibration of the engines when a ship is going astern. When a ship is proceeding ahead and the engine is

turned over, the vibration of that engine will almost jar you off your feet. [Apostles, pp. 170-171.]

Q. Durante. Did you see the Brunswick at the time the man disappeared? A. Yes, sir.

Q. How far away from the deceased was the Brunswick at that time? A. I should judge between 6 and 700 feet, about three ship lengths off.

Q. At this time did you notice, did the Brunswick back her engines? A. Well, my idea is she didn't. Of course I couldn't swear to that.

Q. But she did have headway on her at the time you first noticed her? A. Yes, it was still going, moving ahead.

Q. After you got down to where the man was, did you have an opportunity to notice, or did you notice the Brunswick then? A. After the man went down, I did, yes.

Q. What was she doing then, going ahead or stopped? A. After I saw the man go down I looked up and the steamer schooner was, I should judge, she was about six or seven hundred feet away from the man and at the corner of the dock. [Apostles, pp. 182-183.]

Q. By the Commissioner. When you found out that there was a man overboard, how far were you from the Brunswick? A. I should judge about 700 feet, six or seven hundred.

Q. Was the man in the water between you and the Brunswick? In other words, were you further away from the man than the Brunswick was? A. I should judge we were about the same distance only I was east and the Brunswick was north.

Q. Kind of triangular, was it? A. Yes, sir. I was east and he was north from the man.

Q. By the Commissioner. And the man sank just about the time you reached the point where he was? A. Yes, just about. I should judge a minute or so afterwards. [Apostles, p. 186.]

Q. Thomas Johannesen. Where were you on April 18th last? A. I was working on the pipe. We busted a pipe line and we was repairing it. I was working unscrewing the rubber connections that connects the pipe together.

Q. Did the lumber schooner Brunswick come under your observation at that time? A. I didn't notice it before I heard someone hollering "man overboard."

Q. Where did this cry of "man overboard" come from? A. From the Brunswick.

Q. What was the Brunswick doing at this time? Was she going ahead or stopped or going astern? A. She was going ahead. [Apostles, pp. 187-188.]

Q. At the time the man disappeared for the last time did you notice where the Brunswick was? A. He was going ahead. [Apostles, p. 190.]

NOTE. It was stipulated at the close of Johannesen's testimony, that two other witnesses—Peterson and Asherman—would testify substantially same as Johannesen. [Apostles, p. 192.]

Q. William Hack. Were you employed there (Kerckhoff's Lumber Yard) on the 18th of April last? A. Yes, sir.

Q. Did you see a man falling overboard from the Brunswick * * * did the lumber schooner come under your observation on that date? A. She was going by and I thought she was coming in. I was going to catch the line. I was at the end of the dock and I saw a man in the water.

Q. Then what happened; did the Brunswick continue on her course? A. She kept on going.

Q. How long did she continue on her course going ahead after you saw the man in the water? A. I reckon she went to the other side of Kerckhoff's.

Q. I say, how far from the southern corner were you standing, the southern corner of the Kerckhoff dock? A. I was standing on the end.

Q. What is the length of the Kerckhoff dock? A. I figure about 8 or 900 feet long. [Apostles, pp. 193, 194 and 195.]

4. No Life Boat Was Lowered From the Brunswick.

Q. The Master of the Brunswick. Did you lower a life boat to rescue the man, or have one lowered? A. No, sir. We were making one ready to lower. [Apostles, p. 83.]

Q. Wm. O. Brown, chief engineer. By the Commissioner. But they didn't hoist her (life boat) up? A. No, sir. [Apostles, p. 200.]

5. No Life Buoy, Life Preserver, or Substantial Piece of Wood Was Thrown From the Brunswick.

Q. Gallagher. Did you see anybody throw a life buoy? A. No, sir.

Q. Were you in a position to see that, if a life buoy had been thrown, you would have observed it? A. Yes, sir.

Q. And did you see one in the water? A. Seen one threw off the pilot boat, the only one.

Q. I mean from the Brunswick? A. There was

none thrown from the Brunswick. The only one was thrown from the pilot boat. [Apostles, pp. 171-172.]

Q. William Hack. Were you in a position to closely observe the Brunswick at that time? A. I was about 200 feet, I guess.

Q. I mean there was no intervening object between you and the Brunswick? A. No.

Q. And you particularly noticed the Brunswick, thinking she was coming alongside your dock? A. She left San Pedro dock. I seen her coming and she went on by. That is how I noticed the man in the water. I was watching the boat.

Q. Did you see the Brunswick throw any life preserver? A. No, sir.

Q. Any piece of lumber? A. Nothing.

Q. Or chest cover or other floating substance in the water? A. Not a thing. [Apostles, p. 184.]

Q. Durante. Did you see any life preserver in the water other than the one thrown by the pilot? A. No, sir.

Q. Did you see any plank, piece of wood, that is substantial piece of wood, or anything else, that would assist in rescuing a man in the water? A. No, sir, In fact, I looked on account of Tom Johannesen, the man who brought the hat, told me there was no plank or nothing overboard and I looked around. [Apostles, p. 184.]

Mr. Crider. I move this testimony in regard to what Johannesen said be stricken out.

The Commissioner. It will be stricken out. (Part of *res gestae.*)

Q. In looking around, did you see any lumber, life preserver or chest cover? A. Not only the one the pilot threw out. The only one I saw was the pilot boat. [Apostles, p. 184.]

6. There Were No Efficient Efforts Made by Master, Officers and Crew of the Brunswick to Rescue John H. Hoeffner.

Q. The Master of the Brunswick. Then what did you do? A. What did I do?

Q. Yes. A. The first thing I done, I starboard the helm a little bit so the vessel would swing over so I could back the vessel, because if I hadn't done so I would run her into a pipe line so I would have damaged the pipe line, and also a big steamer proceeding out (in) at the time, I would have blocked the channel and it would be a case of collision. So the minute I seen I could back the vessel enough to stop headway on her I done so. [Apostles, p. 81.]

Q. What speed were you making at this time? A. Not very much speed. Just going slow.

Q. And how close to the deceased did you get with your ship in attempting to rescue him? A. Before I had a chance to turn the Brunswick around or do anything of the kind to rescue the man there was a boat and two launches at the man already, and when I got the head on the Brunswick, getting ready to get the boat ready to go to the man the man was already drowned. [Apostles, p. 82.]

A. In order to avoid having a collision at the same time I am trying to save this man I am not going to put my vessel in front of the steamer coming towards me and have him run into my vessel. [Apostles, p. 98.]

Mr. Crider: What were you going to say? In a case of that kind what? A. The Master. I say in a case of that kind, a man being overboard—the way my vessel is fixed and the vessel coming up behind me in a case of that kind, I don't know what the rules call that

—I can't block the channel for that man coming behind me. If I did he would run into me. [Apostles, p. 99.]

Q. What was the distance between the Kerckhoff Lumber Company dock, that is, the San Pedro side, and this pipe line that you referred to, approximately—just about what distance? A. Approximately about 1,500 feet, somewhere in that neighborhood.

Q. 1,500 feet? A. Probably.

Q. And the length of your vessel is 162 feet? A. Yes. [Apostles, pp. 94, 95.]

Q. Captain, with reference to this steamer you testified as coming up on your starboard quarter, how far away from you was that steamer, just approximately? A. Well, I couldn't exactly, about 2,000 feet probably —somewhere in that neighborhood. [Apostles, p. 94.]

Q. Did you not testify this forenoon that there was a large steamer coming up astern? A. Exactly.

Q. And that was the reason you continued on instead of backing down to him—you didn't— A. I backed the vessel to get away from the channel so as to get the steamer to go by me. [Apostles, p. 216.]

Q. To give the steamer room to pass? A. Yes, and in doing so I had to back the vessel up. [Apostles, p. 217.]

Q. Gallagher. Answer the question; how long were you working at this knot? (which secured line of life buoy to rail.) A. On the ship.

Q. Yes. A. Between four and six minutes anyhow. [Apostles, p. 175.]

Q. By Mr. Crider: You saw them back there working on the life boat, did you? A. They stood there; they didn't attempt to do anything.

Q. You didn't see them do anything with the life boat? A. No, they didn't attempt. Just stood there looking around. [Apostles, p. 172.]

Q. First Mate Lind. Did you see anybody throw a life preserver over? A. No. I saw a life preserver on the deck when I came aft. [Apostles, p. 114.]

Q. By Mr. Crider. I believe you say you saw one of the life preservers on the deck, did you? A. On the deck when I stepped out, when I came aft.

Q. The life preserver was out of the sling, was it? A. Yes.

Q. It wasn't in this sling, or suspenders? A. No.

Q. Was it lying on the deck? A. Yes.

Q. What was its condition in regard to being wet or dry? A. It was wet. [Apostles, pp. 121 and 122 bottom and top, respectively.]

Q. Did you hear the cry of "man overboard?" A. Yes.

Q. What, if anything, was done by you at that time? A. When I heard the man holler I was turning my back to them and I heard a man on the forecastle holler "Man overboard." Then I went aft and I hollered to the captain. He was standing on the port side.

Q. The port side of the bridge? A. Yes. I walked around to see the captain and then walked aft. I saw the man by that time, the man was pretty well astern and there was two boats there launched and the boat alongside the pipe line over there, and there was somebody was hollering to him about 100 feet or probably more from the man at that time to go and get him. They didn't seem to understand it right away, see? And I says, "Come on, we will get the boat ready,

get them over." By that time them people launched two boats and they pull over to the man. When they was up to the man, pretty close to him, we consider well, he would be safe, anyway, for the simple reason we didn't swing the boat overboard because he was right alongside of him. [Apostles, p. 112.]

Q. When you heard the cry "Man overboard," did you not testify you walked from the lumber pile to the port side near where the captain was standing? [Apostles, p. 135 last question.] A. Yes, walked all around.

Q. Then where did you go after walking all around? A. I walked right aft to the boat.

Q. You saw the man in the water then? A. Yes, I saw him in the water.

Q. And you kept looking where the man was in the water? A. And I say, "we better get the boat over."

Q. Then you noticed the boats were coming? A. From the dredges.

Q. And you noticed the pilot boat was coming there? A. Yes.

Q. And you kept looking at them and seeing what they were doing? A. Yes.

Q. How long were you in that position of observation? A. I guess from the time I go fore to aft, about three or four minutes, something like that. [Apostles, p. 136.]

Q. Seaman Nagel. What happened after that, do you know? A. Well, at that particular time, as soon as I saw the man fall overboard, I shouted, "Man overboard." I, myself, grabbed for the rope sling and tried to throw it at him. When I looked over the side with the sling in my hand I saw two (the) man was astern

already, behind the ship. The ship had already passed him.

Q. Seaman Gibson. By Mr. Crider: Now, when you heard the cry of "Man overboard," and went to get this buoy to throw it over, did you saunter along leisurely or did you hurry? A. No, I never heard the cry "Man overboard" because I was down on the poop in the stern of the ship. We were getting the lines for when we go to Blinn's to make the ship fast. I heard these fellows running forward along the house and I heard them and I looked out to see what was going on and I seen them all excited and looking outside, and I looked and see a man floating by and I knew a man was overboard. [Apostles, p. 107.]

7. The Brunswick Was Unseaworthy on April 18, 1922, in Respect to (a) Life Boats and Other Life-Saving Appliances; (b) Incompetency of Master, Officers and Crew; (c) Inadequate Number of Seamen.

Q. First Mate Lind. What life boat did you decide upon launching? A. The port life boat.

Q. Did you have a life boat on the starboard side? A. Yes, sir. [Apostles, p. 113.]

Q. Chief Engineer. Which one of them (life boats) did they attempt to cast adrift? [Apostles, p. 205.] A. The port one.

Q. And the man fell overboard on the starboard side, did he? A. Yes, sir.

Q. And made no effort to cast the starboard boat adrift, did they? A. No, sir. The port one is the best to get over. [Apostles, p. 206.]

Q. First Mate Lind. You say you had a hawser coiled in the life boat? A. On the port side. [Apostles, p. 219.]

Q. And that was your working life boat? A. The working life boat.

Q. And it was in the skids at the time? A. Yes.

Q. And she was secure(d) there? A. She was secure.

Q. Secured for sea, that is, having lashings on? A. Yes.

Q. You also had the boat cover on? A. Yes.

Q. And the boat cover went over the fore and aft strong back? A. Yes.

Q. And it came down and was tied with stops around? A. Yes.

Q. Both stops under the keel? A. Yes.

Q. That was the position she was in at the time the man fell overboard? A. Exactly. [Apostles, p. 220.]

Q. First Mate Lind again. How many life buoys did the vessel carry? A. Four.

Q. Where are those four, where are those four located? A. Four located right aft on top, around the top deck aft on the rail there.

Q. Wouldn't that description you have just mentioned fit anywhere from the midship line over to the taffrail? A. No response.

Q. Can you describe any better the location of the life buoys than what you have already done? A. Right aft of the top deck, right aft the stern. [Apostles, pp. 114 and 115.]

A. Gallagher. * * * There was well, a line, it is onto the life buoy, I think it is about half inch,

to my judgment half inch line. The line had the buoy tied to the guard rail, called a slat knot on it; a flat knot on it, a square knot is what the sailers say, and that line was wet. I tried to get that line loose, and I worked on it. Again the time I did that, we were three ship lengths away from the man in the water. * * * [Apostles, p. 108.]

Q. What kind of line was attached to this buoy? A. I should judge it was the size of a fountain pen. A little bit bigger, maybe. [Apostles, p. 174.]

Q. How long were you working at this square knot you speak of, trying to get it adrift?

Q. Answer the question; how long were you working at this knot? A. On the ship?

Q. Yes? A. I should judge between four and six minutes, anyhow.

Q. And you found it secured, you found the life buoy secured to the rail with a piece of line the size of a fountain pen? A. Yes, sir.

Q. And you had considerable difficulty in untying that square knot? A. Yes, sir.

Q. Are you familiar with knots and splices? A. Yes, sir.

Q. Would you know how to untie a square knot quickly? A. Yes, sir. [Apostles, p. 175.]

Q. There wasn't any kind of a slip attachment for pulling the thing through? A. No, sir. There was a slip, that is, where the buoy sat in, but he was tied on the top of the rail, so you couldn't pull the buoy off. [Apostles, p. 176, top.]

Incompetency of Master, Officers and Crew of the Brunswick.

Q. The Master. I am not asking you about the inspectors. What method did you use for getting the life boats out in case of an emergency? A. Oh, we had the lashings to hoist the boat up and swing the davits out. [Apostles, p. 79.]

NOTE. Lashings are used only to secure objects. Boat falls are used for hoisting and lowering boats. Davit guys are used for swinging davits in or out.

Q. What kind of life boats do you carry on the vessel? A. Wooden life boats.

Q. Can you describe these boats any better than that? A. Not any better. [Apostles, p. 78.]

Q. And how close to the deceased did you get with your ship in attempting to rescue him? A. Before I had a chance to turn the Brunswick around or do anything of the kind to rescue the man there was a boat and two launches at the man already, and when I got the head on the Brunswick, getting ready to get the boat ready to go to the man, the man was already drowned. [Apostles, p. 82.]

A. Johannesen. I was working on the pipe line. We busted a pipe line and we was repairing it. * * * [Apostles, p. 187.]

Q. How far away, about, was the Brunswick at that time from the man overboard? A. Oh, I guess about 300 feet.

Q. What was the Brunswick doing at this time? Was she going ahead, or stopped or going astern? A. She was going ahead.

Q. Now what happened when you heard the cry "Man overboard?" A. I throwed my tools away and jumped in the skiff, untied the skiff and started to pull over.

Q. With relation to the Brunswick how far away from the man overboard were you? A. I was about, I guess, about 800, between 7 and 800. [Apostles, p. 188.]

Q. What kind of a skiff is this that you are speaking of; is it a heavy working boat, or is it a little light frail boat? A. It is a heavy working skiff used on the pipe line.

Q. Now, was there anybody else in the skiff but yourself? A. All alone.

Q. So you pulled double sculls then? A. Yes.

Q. Did you get there just about the time the man disappeared for the last time? A. Just about the time he went down. [Apostles, p. 189.]

Q. The Master. Now when you shoved off from the San Pedro dock you were going about two or three miles an hour? A. I suppose. I say about that.

Q. Did you not testify this forenoon that there was a large steamer coming up astern? A. Exactly.

Q. And that was the reason you continued on instead of backing down to him—you didn't— A. I backed the vessel to get away from the channel so to get the steamer to go by me. [Apostles, p. 216.]

Q. To give the steamer room to pass? A. Yes, and in doing so I had to back the vessel up.

Q. I am not asking you that. I am asking you what duty, if any, you owe to an overtaking vessel? A. To let him pass if he decides to do so.

Q. That is your conception of the inland rules of the road, is it? A. Exactly. [Apostles, p. 217.]

Q. First Mate Lind. What do you call the main rigging? A. The main rigging is the main rigging. [Apostles, p. 116.]

Q. What kind of life boats did the Brunswick carry? A. Two wooden life boats.

Q. Can you describe those life boats? A. Well, they are about 20 feet long and about, I don't know, about 6—

Q. Beyond the dimensions can you give any further description of them so that if I went down I would know what class of boat to look for? A. The customary equipment, all equipment with air tanks.

Q. Did you have a compass on (in) the life boat? A. Yes.

Q. What make of compass? A. I don't know what make it is—Thompson.

Q. What kind of compass did you have for the ship, the Brunswick herself? A. I have forgotten. [Apostles, p. 118.]

Q. Seaman Gibson. What kind of line was attached to this life buoy? A. Just a common small manila rope as big as your finger.

Q. Describe it now. You are an A. B. (able body seaman.) Describe this what this line was? A. It is an ordinary manila rope, what we use of heaving line.

Q. Can you give any better description of that line than that? [Apostles, p. 107.] A. That's all you could describe it, about 15 feet long. [Apostles, p. 102.]

Q. How fast was she (Brunswick) going about? A. Well, I guess she was making a couple of miles an hour.

Q. When were you examined for A. B.? A. I never been examined for A. B.

Q. Do you mean two miles an hour or two knots an hour? A. Well, call it knots. I call it miles. [Apostles, p. 103.]

Q. Seaman Nagel. As winchman you are included as one of the deck hands? A. I belong to the deck crew.

Q. You are one of the four men of the deck crew? A. Yes. [Apostles, p. 143.]

Q. And you have lost the use of one eye, have you? A. I have. [Apostles, p. 146.]

Q. Now, did the Brunswick have any life buoys on it at that time? A. It did.

Q. How many? A. Four, as far as I can remember. I never counted them. [Apostles, p. 152.]

Brunswick Was Inadequately Manned on April 18, 1922.

Q. First Mate Lind. How many deckhands have you got on the Brunswick, or did you have last April on the Brunswick? A. Five men,—four men.

Q. Four men? A. Yes, sir, besides the longshoremen. [Apostles, p. 141.]

Q. Seaman Nagel. Is it true you have got four all together, four deckhands? [Apostles, p. 143, last question.] A. I couldn't say exactly how many men we had at that particular time, but as a rule we carry a roll of eight sailors and a winchman, sometimes even nine. [Apostles, p. 144.]

Contradictory and Conflicting Testimony.

Q. The Master. When did you leave San Pedro Company dock? A. Just as the 8 o'clock whistle blowed, or a few minutes after. [Apostles, p. 75.]

Q. First Mate Lind. And you use longshoremen for mooring and unmooring a ship, do you? A. Yes, sir. [Apostles, p. 141.]

Q. By Mr. Crider. Did you tell him (deceased) you were going to move it? A. It was hollered out "we're going to move; let go the lines."

Q. He was actually working on his sling when the boat was moving out in the water there? A. Yes. [Apostles, p. 140.]

Q. What orders did you give him (deceased)? A. I gave him orders to, I told him to start to sling up the lumber, get the sling ready.

Q. What time was this about? A. Just about two or three minutes past eight.

Q. Were you under way at that time? A. Yes, sir.

Q. Did you see this man in the pilot boat take the hat from the drowning man? A. No, not exactly from the drowning man, but from the position that he was in, right alongside the boat, where the man was, so to take the hat it must be probably laying on the water or on the man's head.

Q. You saw him take the hat off? A. Yes. [Apostles, p. 129.]

Q. Johannesen. Did you see the pilot take the hat of the deceased? A. No. I took it.

Q. You took it? A. Yes. [Apostles, p. 190.]

Q. Durante. Now did the pilot pick up the hat of the deceased? A. No, he didn't.

Q. Who did? A. A fellow by the name of Johannesen came over with a skiff and he picked the hat up after the man went down.

Q. You saw it? A. Yes and he passed it to the pilot man. [Apostles, p. 182.]

Q. William Hank. Did you see the pilot take the hat of the deceased from the water? A. No, sir.

Q. Did you see anybody take the hat? A. I know the fellow in the skiff picked up the hat.

Q. You saw him pick that hat up? A. Yes, sir. [Apostles, p. 196.]

Q. The Master. How big was the sling, captain, the sling of lumber? A. Well, I didn't size it up. I should judge it was about, probably, 20 inches high, that he was trying to put the sling around.

Q. Did you see him working with the sling on that batch of lumber? A. No, sir.

Q. Were there any life buoys thrown to Mr. Hoeffner when he was in the water? A. Yes, sir.

Q. There life buoys thrown? A. Yes, sir.

Q. Who threw that life buoy? A. The sailor sitting right over there.

Q. Did you see this man throw the life buoy? A. No, sir. [Apostles, p. 85.]

The above entitled matter, having, on the 6th day of November, 1922, been referred to United States Commissioner Stephen G. Long, by stipulation of the parties, and in pursuance thereof, under an order of the court directing him to take testimony, make findings of fact and recommend appropriate conclusions of law, and judgment and decree, and said commissioner, having personally seen and heard all the wit-

nesses of the respective parties hereto, and having had the matter submitted to him for report in conformity with said order of reference, and the said commissioner, having on the 26 day of February, 1923, made his report in writing as follows:

Findings of Fact.

I.

That on the 18th day of April, 1922, and all of the time thereafter, the libellant was, and is, a housewife, having her place of residence at San Pedro, California; and that on the 18th day of April, 1922, the respondent National Steamship Company was the owner of a lumber vessel called the "Brunswick."

II.

That on April 18, 1922, John H. Hoeffner was employed by the master of the lumber vessel "Brunswick" to assist in unloading the deck load of cargo lumber on board that vessel, then at San Pedro Lumber Company's dock, which is on the west side of the Inner Harbor, San Pedro, California; that at eight o'clock in the morning of that date, the "Brunswick" cast off from that dock to go to the Blinn Lumber Company's dock on the east side of said Inner Harbor, but it was necessary for the said vessel to proceed in a northerly direction for a short distance so as to clear a dolphin to which the U. S. Government dredge was moored.

III.

That after the "Brunswick" cast off from the San Pedro Lumber Company's dock, as aforesaid, the first mate, who had charge of unloading the lumber cargo of that vessel, ordered the said John H. Hoeffner to sling up the lumber, and in obedience to said orders, it

was necessary for him to go on top of the lumber pile, stowed fore and aft, eight or nine feet high, and extended to the full width of that part of the ship and was flush with both sides thereof. The lashings of this lumber pile had previously been removed, and the top was a disordered mass of lumber; that said John H. Hoeffner, in company with his working partner, went on top of this lumber pile, the partner working inboard, and Hoeffner on the outboard side, it being necessary to start slinging from the extreme outboard part of the lumber, and immediately upon getting to his working position, and trying to pull the sling through on the extreme starboard side of the ship, the said John H. Hoeffner stepped on a plank, which tipped, and then stepping on another plank that tipped too, and precipitated him overboard, and he was drowned.

IV.

That there were no life lines, life rails, or other protection outboard of this lumber pile, which, while a vessel was under way in a narrow harbor, and being subject to pitch or roll from the wash of propellers of other vessels, or to the sudden jar of hitting or being hit by other vessels or obstructions, was a place dangerous to life and limb for those who were required to work thereon.

V.

That the said John H. Hoeffner was precipitated overboard a few minutes after the vessel "Brunswick" got under way, as aforesaid, and that the speed of that vessel at that time was about two or three miles per hour; that the "Brunswick" did not immediately stop when the cry of "Man overboard" was raised; that no life boat was lowered, no life preserver, life buoy, or

piece of lumber was thrown from the "Brunswick" to said John H. Hoeffner, after he was precipitated overboard, and while struggling in the water, and that no efficient efforts were made to rescue him by the master, officers and crew of the said ship "Brunswick," and that the life boats and other life saving appliances of said ship "Brunswick" were not, at the time that said John H. Hoeffner was precipitated overboard therefrom, reasonably fit and accessible to effect his rescue, and that the master, officers and crew of said ship "Brunswick" were incompetent and culpably inefficient in the performance of their duties in matters pertaining to the handling of the ship and in the use of the ship's life saving appliances.

VI.

That said John H. Hoeffner was engaged in the work of longshoreman for about five months, and it does not appear from the evidence, how much of that time he was employed on board ships; that he had no means of ascertaining the condition of the lumber pile on which he was required to work until he got on top thereof, when he was immediately precipitated overboard; that he had no means of ascertaining the incompetency of the master, officers and crew of said ship "Brunswick" in their duties with the condition, accessibility and use of the life saving appliances of said ship "Brunswick," and that the danger resulting, or that might result from such conditions, as aforesaid, was a latent and not an obvious danger; that said John H. Hoeffner was not guilty of contributory negligence in the performance of his said work on board the said ship "Brunswick," and in no wise, while so employed, did he act otherwise than in a careful, cauetious and prudent manner under the circumstances.

VII.

That said John H. Hoeffner, on the 18th day of April, 1922, and while in the employ of respondent on board said ship "Brunswick," came to his death by drowning in the harbor of San Pedro, California; and that said death was caused by the failure of the respondent to furnish him with a safe and suitable place in which to perform said employment, and by the failure of the respondent to provide and maintain, in a reasonably fit and accessible condition, proper and efficient life saving appliances on board said ship "Brunswick," and in the failure of the respondent to provide and maintain master, officers and crew competent and efficient in the handling of said ship "Brunswick" and in the stowage, accessibility and use of life saving appliances thereof.

VIII.

That said John H. Hoeffner left surviving him as his only heir Christina M. Hoeffner, his widow; and that said Christina M. Hoeffner was dependent upon him for support and maintenance.

IX.

That on the 25th day of July, 1922, by the order of the Superior Court of the county of Los Angeles, in the state of California, duly given and made, the libellant was appointed administratrix of the estate of John H. Hoeffner, deceased, and letters of administration on said estate were ordered to issue to libellant upon qualifying, and that the libellant thereafter qualified as such administratrix, and letters of administration were issued to libellant on the 25th day of July, 1922, and libellant ever since has been and now is the duly qualified administratrix of the estate of John H. Hoeffner, deceased.

X.

That before his decease, the said John H. Hoeffner was a man of fine physique, and in excellent health, was continuously employed, and was earning and giving to his said wife, Christina M. Hoeffner, an average weekly wage of fifty-five ($55.00) dollars; that said John H. Hoeffner was, at the time of his death, of the age of 37 years, and that his life's expectancy was 30.35 years; that the libellant has suffered injury by the death of said John H. Hoeffner in the sum of fourteen thousand four hundred ($14,400.00) dollars, as compensatory damages, and by reason of the reckless indifference to the rights and safety of said John H. Hoeffner by the respondent, as aforesaid, the further sum of one thousand ($1,000.00) dollars, as exemplary or punitive damages.

XI.

Conclusions of Law.

As conclusions of law, from the foregoing findings of fact, I find that the libellant, Christina M. Hoeffner, as administratrix of the estate of John H. Hoeffner, deceased, is entitled to recover from the respondent, National Steamship Company, the sum of fifteen thousand four hundred ($15,400.00) dollars, and I recommend that judgment and decree be given to the libellant, Christina M. Hoeffner, as administratrix of the estate of John H. Hoeffner, deceased, against the respondent, National Steamship Company, in the sum of fifteen thousand four hundred ($15,400.00). In arriving at the foregoing conclusion, I have carefully considered the authorities cited in the briefs filed by proctors for the respective parties herein, all of which is respectfully submitted.

STEPHEN G. LONG,
United States Commissioner.

(Seal)

Respondent filed exceptions in due time to the Commissioner's report, in substance as follows:

The evidence was insufficient to support findings of fact under Articles III, IV, V, VI and VII, and that there is not sufficient evidence to support the foregoing findings, it entitled to recover $15,400.00 from respondent, is unwarranted. Further, that the said foregoing facts, nor any of them are material to the issues raised in the pleadings on file herein. Again, that the Commissioner's findings of fact and conclusions of law did not take into account the fact that the accident was inevitable and unavoidable.

Respondent's remaining exceptions are, as follows:

1. Contributory negligence.
2. Court did not have jurisdiction of the action or the parties thereto.
3. No evidence to support the finding that exemplary or punitive damages should be assessed against respondent.

Respondent in his amendment to exceptions set out that the findings of fact made by the Commissioner do not support the conclusions of law, and especially that part finding that the libellant is entitled to recover from the respondent the sum of $15,400.00.

The court sustained the exceptions to the findings of fact and conclusions of law made by the Commissioner, and fully discussed the case in its opinion, which is included in the final decree dismissing the libel.

Findings of the Court.

1. The court found substantially as follows:

2. Court held that the finding that there were no life lines, life rails or other protection outboard of the deck-load of lumber (where deceased was required to work) and that in consequence, because of the liability to pitching and rolling, hitting or being hit by vessels or obstructions, the place was a dangerous one, is obviously irrelevant and untimely, because of the absence of any suggestion of any such happenings.

3. That the examination of the master, officers and crew by proctor for libellant as to certain matters of seamanship and the like, were wholly irrelevant to any inquiry pending before the Commissioner.

4. The court found that it is the fact that no life lines or life rails or other protection was placed around the deck-load of lumber, and that such protection was not required because "Deceased was sent to the top of the lumber pile in broad daylight," and that deceased assumed the risk. (The court did not use the words "assumed the risk," but the language used indicates that finding.)

5. That the deceased was precipitated into the water not because of any negligence of the respondent or any of its employees, but because of his own contributory negligence.

6. That there was no testimony as to the direction or speed with which water in the channel was moving, if at all, but that it must have been moving because the

deceased very rapidly either swam, that is, "paddled," or drifted beyond the stern of the ship.

7. The court further found that the captain stopped the ship with all celerity he could command, in view of all the circumstances, and that an approaching (overtaking) vessel had to be taken into consideration.

8. The court found that in speaking of the Brunswick after the deceased was precipitated overboard: "It is obvious it could not be stopped immediately, and an approaching (overtaking) vessel had to be taken into consideration."

9. That the Inland Rules of the Road respecting one vessel overtaking another, etc., could only be considered where the vessels were proceeding normally, and that obviously, the rules could not apply, at least in an unqualified degree, where one vessel, the one being overtaken, is compelled, because of some exigency arising, to change its normal course of procedure and either stop or turn around or the like.

10. And that under such circumstances there was a duty devolving upon the master of the "Brunswick" to exercise care that he should not, in his endeavor to extend succor to the deceased, do that which would bring other lives or property into danger.

11. That it should be kept in mind that there were upon the water at the time two or three small craft, and were nearer to the deceased than those upon the Brunswick were, and should be taken into consideration

in determining the duty devolving upon the men of the Brunswick and the adequacy of their efforts.

12. The court further held: If it could be said that deceased could have been saved if proper and efficient life saving appliances not on board the Brunswick had been there, and had been used with reasonable promptitude and efficiency by the officers and crew thereof, then, of course there would have been strong reason for supporting the conclusions arrived at by the Commissioner, but that it should be borne in mind that it was stipulated that such equipment was there at time of inspections made both prior to and subsequent to the accident, and that there was no suggestion from any source of any change, and that the captain testifies that the usual and proper lifeboats and life buoys were on board and in their proper place.

13. That the partner of the deceased, a longshoreman, after deceased fell into the bay, started to throw a life preserver to him, obviously though working upon it, due perhaps to his excited state he did not know how to remove it from its appropriate receptacle. Instead of lifting it up, as he should have done, and merely breaking the twine which held it in place, apparently he was attempting to put it down through a fixed rack. This occupied some minutes. Before, however, he had succeeded in releasing the buoy, one of the sailors came running up, and without difficulty took it from its place.

14. Very likely the partner of the deceased working on the life buoy deterred some of the sailors from going to it and throwing it overboard. Without doubt, it was thought that the partner of the deceased would do that what he was trying to do, to wit, throw a life preserver to the deceased.

15. That the deceased having fallen overboard, due to his own negligence, no recovery could be had unless it should be proven to the degree required by law, that the loss of his life thereafter was due to the neglect, want of care, and culpability of the servants of the respondent. I cannot believe the proof adduced suffices to establish this conclusion, and disaffirm the conclusions and recommendations reached by the Commissioner, and that if the rule, contended for by the respondent, as illustrated in Burton v. Grieg, 271 Fed. 271, be accepted, then there is less ground for a decree in favor of libellant upon the facts actually adduced.

Final Issues.

Each of the above findings of the court has been assigned as error on this appeal, and become therefore the main issues in the case.

ARGUMENT.

Issue I.

The deceased was precipitated overboard immediately upon getting to his working position on top of lumber pile.

Gallagher, whom the testimony discloses was the working partner of the deceased, was ordered by first mate exactly three minutes past 8 to go to work, started out in search of sling, and having found it, proceeded to the top of lumber pile with deceased, and then tried to put this sling under prepared sling load of lumber, but the threads of splice stuck under the wood, and in pulling it back deceased stood on top of that load. [Apostles, p. 167, bottom.]

It is true that Seaman Nagel testified as follows:

A. Well, the only thing I recollect, when these two men were putting on the sling, this man, of course, he couldn't go on the outside of this load of lumber he had piled on that sling, because this particular load of lumber was piled right on the edge of the ship, also the bulwarks, and he couldn't get the sling, and he stood on top of the deck-load, etc. [Apostles, p. 145.] But this witness had but one eye, and he was some distance from the deceased. [Apostles, p. 146.] He was standing on forecastle head (the break or after end of forecastle), [Apostles, p. 144] and later he testified as follows: To the extreme end aft I wouldn't notice it because the forecastle head is lower than the deck-load. [Apostles, p. 149, top.]

Obviously, if two men would, or could, build a sling load of lumber of pieces 2″x12 by 25 or 30 feet long, they would place the sling in position first. The logical inference is that when such heavy planks are loaded they are placed in sling loads on chocks, and this facilitates unloading; chocks being uniform in size and the deck loads secured by chain lashings. Upon unloading it is only necessary to put sling under load, hook to block, and hoist out. This procedure is almost invariably referred to as building a sling load. It is the lumbermen's equivalent for preparing a sling load.

The fact that the deceased was precipitated overboard immediately upon getting to his working position, as testified by Gallagher, *supra,* is borne out by the testimony of the master as to time leaving the dock, i. e., just as the 8 o'clock whistle blowed, or a few minutes after [Apostles, p. 75]; by the testimony of First Mate Lind, "that he gave deceased orders to sling up lumber after the ship got under way, just about two or three minutes past eight; by the fact that the vessel left San Pedro Lumber Co. dock, and was seen by Hack, who was standing on southern corner of Kerckhoff's dock, adjoining and next dock north [Apostles, p. 195]; by the testimony of the master [Apostles, p. 216], Seaman Gibson [Apostles, p. 103]; Nagel [Apostles, p. 146], that the vessel was going about two or three miles an hour, and by the testimony of Chief Engineer Brown, that the vessel had full speed steam in boilers at time [Apostles, p. 204,

bottom], and that his log showed that the vessel went from one dock to another in 25 minutes, including the time spent in their alleged attempt to rescue deceased [Apostles, p. 209, top].

Issue II.

That the findings that in consequence of the absence of life lines, life rails or other protection on top of lumber pile, where deceased was required to work while vessel was under way, and the liability to pitch, or roll of the vessel, or other jar, the place was dangerous, were irrelevant and untimely, because of the absence of a suggestion of any such happening.

Art. 29, Sec. 7180, Barnes' Federal Code, page 1707, provides that:

> "Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, *or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.*"

In the Beechdene, 121 Fed. 594, held:

> "It is true that, if the officers of a ship direct a certain thing to be done in a certain way, they are held responsible if they negligently send the person employed by the ship into a place of danger, the danger of which could be obviated by reasonable care on the part of the officers of the ship."

In The Buffalo, 154 Fed. 815 (C. C. A., Second Cir.), it was held:

> "The rule of the maritime law that a vessel is not liable *in rem* for an injury to a seaman through the negligence of owner or master, does not apply to the case of a longshoreman who is employed by the owner of a vessel to work thereon, and is injured through being given an unsafe place to work."

Again, in Port of New York Stevedoring Corporation v. Castagna, 280 Fed. 619 (C. C. A., Second Circuit, Mar. 6, 1922), that court, on page 622, held:

> "The duty of inspection arises out of the duty of the master to provide a safe place for the work of the employee, a duty which may not be delegated where they could have been discovered by reasonable inspection and by the exercise of reasonable care."

Again, in Pacific American Fisheries Co. v. Hoof, 291 Fed. 306, the Circuit Court of Appeals for the Ninth Circuit, at page 308, the court held:

> "The duty of the master to provide a safe working place and safe appliances is a positive and continuing one, and cannot be delegated. It was claimed on the trial that it was the duty of the appellee to inspect the ladder in question, but the court below found otherwise, and of that finding there is no complaint. If that duty did not devolve upon the appellee, it devolved upon someone else, and whoever discharged that duty represented the master. When the working place and appliances are unsafe, it is no answer to say that

> they were rendered unsafe at some previous time by the act of another servant. As already stated, the duty is a continuing one, and notice of defects and dangers will be imputed to the master."

It is a matter of judicial notice, that there is considerable traffic in San Pedro harbor. Vessels of all kinds constantly go in and out, and move from one place to another there. The inner harbor is narrow, and the water displaced by moving vessels and disturbed by the propellers, strike the near docks on both sides, and recoil, making a much larger swell and greater disturbance than obtain in large bodies of water under similar weather and traffic conditions. No vessel can move in San Pedro harbor without pitching and rolling, and, especially, in the month of April, which, even in San Pedro, is not a month of fine weather. Being thus a matter of judicial notice, especially for the District Court, the pitch and roll of a ship under way need not be alleged nor proved, and hence the unprotected pile of lumber on board the Brunswick, under the circumstances, was inherently dangerous. The added liability of hitting or being hit by another vessel or obstruction only enhanced the element of danger, and consequent liability of the respondent.

Issue III.

That the examination of master, officers, and crew, by proctor for libellant, as to certain matters of seamanship and the like, were wholly irrelevant to any inquiry pending before the commissioner.

Obviously the court ignored the fact that article III of the libel specifically alleged the incompetency of the seamen on board respondent's vessel Brunswick. The term seamen means everyone on board constituting the personnel complement of a ship, i. e., master, officers and crew. However, regardless of any such allegation in the libel, the maritime law requires the owner of every vessel to furnish competent master, officers and crew. The Circuit Court of Appeals for the Ninth Circuit, in The Ralph, 229 Fed. 52, at page 54, the court held:

> "In re Pacific Mail S. S. Co., 130 Fed. 76, 64 C. C. A. 410, 69 L. R. A. 71, this court held that it is the duty of the owner of a ship carrying goods and passengers, not only to provide a seaworthy ship, but also to provide the ship with a crew adequate in number and competent in their duties with reference to all the exigencies of the intended route, and that such a duty rests upon the owner by the general maritime law. In Lord v. G. N. & P. S. Co., 4 Sawy. 292, Fed. Cas. No. 8,506, it was held to be the duty of the owner to provide a vessel with a competent master and a competent crew, and to see that the ship when she sails is in all respects seaworthy, and that he is bound to exercise the utmost care in these particulars. In Adams v. Bortz (C. C. A.), 279 Fed. 521, it was said that the basic thought is that the vessel shall be equipped to perform the duty which she owes to the human beings on board her, and the cargo which she carries. Rainey v. N. Y. & P. S. Co., 216 Fed. 449, 132 C. C. A. 509,

is specially laid down by Arnold on Marine Insurance (10th Ed.), pp. 931, 932, and in Holland v. Seven Hundred and Seventy-five Tons of Coal (D. C.), 36 Fed. 785, 787, Judge Jenkins said that a vessel is not seaworthy if there be a failure to provide a proper crew."

Early in the examination of the master of the Brunswick, proctor for libellant sought to ascertain the "tactical diameter" of that ship, i. e., the time required from ascertained speed to stop, back, turn around, etc., and was surprised at his complete lack of knowledge. Further examination on the most elementary principles of seamanship, especially in reference to life boats and life-saving appliances, conclusively proved that the captain, first mate and crew did not have even the crudest knowledge of even the fundamental principles of these subjects or of seamanship in general. [Apostles, pp. 75 to 80, 84, 86 to 88, 95 to 97, 101 to 104 115 to 118.]

Issue IV.

The court found that it is a fact that there were no life lines, life rails, or other protection around the deck load of lumber, on top of which deceased was required to work (while the vessel was under way), and that such protection was not required because deceased was sent to the top of this lumber pile in broad daylight (and thus assumed the risk).

Much of what has been said in discussing Issues I and II is applicable here, especially as to the time he

was precipitated overboard, the condition of the top of the lumber pile, and the vessel under way at the time, and, naturally subject to pitch and roll.

In O'Brien v. Luckenback S. S. Co., 293 Fed. (C. C. A., 2nd Cir.) 170, at page 178, cited with approval the following:

> "In Imbrovek v. Hamburg American Steam Packet Co. (D. C.), 190 Fed. 229, the plaintiff was injured in the lower hold of a steamship while working for the stevedore. He was working under a hatch and was injured by the hatch falling into the hold, with everything resting upon it. In that case the court said:
>
> " 'It is easy to make a partially covered hatch absolutely safe. The cross-beams of the hatch have holes in the ends. There are corresponding holes in the hatch combings. Pins can be put through those holes. It takes about five minutes to put them in. When in place, an accident such as gave rise to this case cannot happen.' "

Obviously it is easy to stretch along the side of the ship a few life lines abreast of the lumber pile. It takes but a few minutes to put them up and remove them as the lumber has been removed, or to wait until the ship was moved to the dock at the east side of the channel where vessel was going before sending inexperienced longshoremen on top of a lumber pile. Either one of these two methods would conduce to safety.

In The Themistocles, 235 Fed. Rep. (C. C. A., 2nd Cir.), 81, June 6, 1916, it was held that:

> "A servant assumes all the ordinary and usual risks and perils of the employment, as well as all others of which he knows, or by the exercise of reasonable care might know; but he does not assume such risks as are created by the master's negligence, nor such as are latent, *nor such as are discovered only at the time of the injury.*"

In The Isthmian, 201 Fed. 572:

> "A ship was held liable for injury to a stevedore by falling through a hatchway, on the ground of its failure to furnish sufficient light to work by safely."

Again, in Chesapeake & Ohio Railroad Co. v. Proffitt, 241 U. S. 462, 468, 36 Sup. Ct. 620, 622 (60 L. Ed. 1102), the court in a unanimous opinion said:

> "To subject an employee, without warning, to unusual dangers not normally incident to the employment, is itself an act of negligence. And, as has been laid down in repeated decisions of this court, while an employee assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages, so far as these are not attributable to the negligence of the employer or of those for whose conduct the employer is responsible, the employee has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work (and this includes care in establishing a reasonably safe system or method of work), and

is not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known of it. The employee is not obliged to exercise care to discover dangers not ordinarily incident to the employment, but which result from the employer's negligence."

Issue V.

That the deceased was precipitated into the water not because of any negligence of the respondent, or any of its employees, but because of his own negligence.

The Commissioner found as a fact "that the deceased was not guilty of contributory negligence in the performance of his said work on board the said ship Brunswick, and in no wise, while so employed, did he act otherwise than in a careful, cautions and prudent manner under the circumstances." [Apostles, p. 20, top.]

In view of the facts established under Issues I, II and IV, *supra*, and law applicable thereto, it is difficult to conceive by what process of reasoning the court arrived at its conclusion as heretofore cited, since the evidence conclusively negatived negligence on the part of the deceased, and equally conclusively proved gross and indefensible negligence on the part of respondent and its employees. Further, in addition to the violation of statutes enacted for the safety of em-

ployes, article 29, *supra* cited, respondent's employees violated other such statutes, hereinafter set forth.

Turning to the case of Western Fuel Company v. Garcia, a case of death by wrongful act in California waters, decided by the Circuit Court of Appeals for the Ninth Circuit, and reported in 255 Fed. 817, at pages 819, 820, the court held:

> "There being no United States statute upon the subject, the appellee's right to recover in the instant case must be found in a statute of California. Section 377 of its Code of Civil Procedure provides:
>
> " 'When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just.'
>
> "The right upon which the judgment of the court below rests was clearly given by that statute. Subsequently section 1970 of the Civil Code of California was enacted, which provides, among other things, as follows:
>
> " 'An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same

employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, or unless the employer has neglected to use ordinary care in the selection of the culpable employee: Provided, nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and also when such injury results from the wrongful act, neglect or default of a co-employee engaged in another department of labor from that of the employee injured. * * *'"

"April 18, 1911, California passed another act (St. 1911, p. 796), providing, among other things, as follows:

" 'In any action to recover damages for a personal injury sustained within this state by an employee while engaged in the line of his duty or the course of his employment as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee, and it shall

be conclusively presumed that such employee was not guilty of contributory negligence in any case where the violation of any statute enacted for the safety of employees contributed to such employee's injury; and it shall not be a defense:

"'(1) That the employee either expressly or impliedly assumed the risk of the hazard complained of.

"'(2) That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant.'"

In this statute contributory negligence is not a bar where the negligence of the employee was slight and that of the employer was gross in comparison.

It will be noted that in admiralty law, contributory negligence is not a bar to recovery. The Supreme Court of the United States, in The Max Morris, where libellant was a longshoreman, as here, in 137 U. S. 1, 34 L. Ed. 586, at page 589 of 34 Law Edition, bottom of page, held:

> "The mere fact of the negligence of the libellant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery."

Further, the California statute, cited by the Circuit Court of Appeals for the Ninth Circuit, in 255 Fed. at page 820, *supra,* provides:

> "* * * The fact that such employee may have been guilty of contributory negligence shall

not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison. * * *"

Again, in O'Brien v. Luckenbach S. S. Co., 293 Fed. (C. C. A., 2nd Cir.) 170, at page 180, that court, in speaking of contributory negligence, held:

"(10) In such a case as this it must not only be remembered that the defendant must prove the plaintiff's contributory negligence, but that in order to prove it the evidence must be more than usually convincing. Thus in Harrison v. N. Y. C. & H. R. R. Co., 195 N. Y. 86, 87 N. E. 802, one of the questions was whether the deceased was free from contributory negligence. Chief Judge Cullen, writing for a unanimous court, said:

" 'The deceased having been killed, less evidence was required from his personal representative to establish his freedom from negligence than would have been required from him had he survived and been able to testify.' "

Issue VI.

That There Was No Testimony as to the Direction or Speed With Which Water in the Channel Was Moving, if at All, but That It Must Have Been Moving Because the Deceased Very Rapidly Either Swam, That Is, "Paddled," or Drifted Beyond the Stern of the Ship.

Point I.

There was some testimony as to the direction of the water at that time. Johannesen, who, himself alone,

pulled the heavy skiff 7 or 800 feet from inner to ourter part of channel in attempting to rescue deceased, testified:

"The tide was coming in, I guess, as far as I can remember. I ain't quite sure." [Apostles, p. 189.]

POINT II.

It has been conclusively established by the testimony, that instead of the deceased swimming, paddling, or drifting beyond the stern of the ship, the vessel Brunswick continued on her course for some time after man fell overboard, i. e., kept going ahead. The master [Apostles, pp. 213, 214], Gallagher [Apostles, pp. 167, 168, 170, 171], Durante [Apostles, pp. 182, 183], Johannesen [Apostles, pp. 188 and 190], also stipulation that two other witnesses would testify same as Johannesen [Apostles, p. 192], William Hack [Apostles, p. 194, top].

POINT III.

The propeller in moving the vessel ahead also moves the water astern.

Issues VII, VIII, IX and X.

"The court further found that the captain stopped the ship with all celerity he could command, in view of all the circumstances, and that an approaching (overtaking) vessel had to be taken into consideration."

"The court found that in speaking of the Brunswick after the deceased was precipitated overboard: 'It is obvious it could not be stopped immediately, and

an approaching (overtaking) vessel had to be taken into consideration.' "

"That the Inland Rules of the Road respecting one vessel overtaking another, etc., could only be considered where the vessels were proceeding normally, and that obviously, the rules could not apply, at least in an unqualified degree, where one vessel, the one being overtaken, is compelled, because of some exigency arising, to change its normal course of procedure and either stop or turn around or the like."

"And that under such circumstances there was a duty devolving upon the master of the 'Brunswick' to exercise care that he should not, in his endeavor to extend succor to the deceased, do that which would bring other lives or property into danger."

POINT I.

While it may be conceded that the captain stopped the ship *with all the celerity at his command,* his own testimony conclusively proved that the celerity at his command was negligible or nil.

POINT II.

Here is a loaded vessel, 162 feet long, 34 feet beam. gross tonnage of 532, and 500 horsepower, Master. [Apostles, p. 75], just shoved off from dock, and going about two or 3 miles per hour [Apostles, pp. 103, 146 and 216], with full speed steam in boilers Chief Engineer, [Apostles, 204, bottom], which could have been stopped almost instantaneously by backing engine full power. Even when engine is stopped the vessel would

almost immediately stop. The fallacious reason given by the captain [Apostles, p. 213], "that he dare not stern, lest the suction of the propeller would drag him down and he would get killed that way", is born of ignorance, and conceived by incompetency. Every person standing on a dock or at the stern of a vessel knows that when the propeller backs full speed, or even slow speed, the water is forcibly pushed forward towards the forward part of the ship, and this powerful forward movement of the water carries with it every floating object in its immediate vicinity. Thus, the man is immediately pushed forward, and the momentum of the ship in a forward direction is immediately arrested.

Point III.

It is one of the most elementary principles of navigation, and law applicable thereto, that a leading or overtaken vessel owes absolutely no duty to another vessel coming up from astern, or overtaking vessel, except to inform the overtaking vessel by appropriate signal of her intended change of course. The giving of signal to overtaking vessel of abrupt change of course is governed by the General Prudentiary Rule, No. 27. The duty is also on the overtaking vessel not to come closer to the overtaken vessel than she can do with safety to the leading vessel and herself.

Article 24 of the Inland Rules, Act. June 7, 1897, c. 4, 30 Stat. 101 (Comp. Stat. Sec. 7898), provides that:

"Notwithstanding anything contained in these rules, every vessel, overtaking any other, shall keep out of the way of the overtaken vessel."

And the article also provides that:

"Every vessel coming up with another vessel from any direction more than two points aft her beam * * * shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear."

In The M. J. Rudolph, 292 Fed. (C. C. A., 2nd Cir.) 740, at page 742, that court held:

See The James L. Morgan, 225 Fed. 24, 26, 140 C. C. A. 360.

"(2, 3) If the overtaking vessel comes so close to an overtaken vessel that a sudden change of course by the latter may bring about a collision the fault is that of the overtaking vessel. She should not come so close without a signal. As this court held in The Merrill C. Hart, 188 Fed. 49, 51, 100 C. A. 187, 189:

" 'The overtaken vessel is not required to look behind before she changes her course, however abruptly.'

"And the rule which requires a signal from the overtaking vessel *and assent from the other* is intended, as we said in that case, to avoid just what, on the Rudolph's theory, happened on this occasion."

The Supreme Court of the United States, in speaking of sailing rules, in The Steamship City of Washington, 92 U. S. 31-41, 23 L. Ed. 600, held:

> "Usages, called sea laws, having the effect of obligatory regulations, to prevent collisions between ships engaged in navigation, existed long before there was any legislation upon the subject, either in this country or in the country from which our judicial system was largely borrowed.
>
> "Plenary jurisdiction was conferred upon the courts in such controversies; and the judicial reports show, beyond peradventure, that the courts, both common law and admiralty, were constantly in the habit of referring to the established usages of the sea as furnishing the rule of decision to determine whether any fault of navigation was committed in the particular case; and, if so, which of the parties, if either, was responsible for the consequences.
>
> "Examples of the kind are quite too numerous for citation, and they are amply sufficient to prove that the usages of the sea, antecedent to the enactment of sailing rules, constituted the principal source from which the rules of decision, in such controversies, were drawn by the courts of admiralty and all the best writers upon the subject of admiralty law. Macl. Ship., 2nd ed., 280; Williams & B. Pr., pp. 4, 15.
>
> "Sailing rules and other regulations have since been enacted; and it is everywhere admitted that such rules and regulations, in cases where they apply, furnish the paramount rule of decision."

Issue XI.

That it should be kept in mind that there were upon the water at the time two or three small craft, and were nearer to the deceased than those upon the Brunswick were, and should be taken into consideration in determining the duty devolving upon the men of the Brunswick and the adequacy of their efforts.

Point I.

Even a cursory glance at the testimony heretofore set out shows that after the man fell overboard, the Brunswick kept going ahead, until she got into position abreast or opposite where these men in the boats referred to were working. All this time nothing was done by master, officers or crew of that ship, except to watch, and some of them shouted to the men in the boats. The record fails to disclose a single order given by the master. The first mate testified about his walking all around, and aft, and upon his arrival there, assumed a position of observation [Apostles, p. 136], and when he got aft, the life preserver was on deck [Apostles, p. 114], and reiterated [Apostles, p. 122], while Gallagher testified that he spent 4 to 6 minutes before he could untie the line holding the life buoy to the rail.

Chief Engineer Brown testified: "I heard them holler 'Man overboard,' rushed to the side, and started to get a life buoy but I seen it was too late so I didn't get one" [Apostles, p. 198]. Seaman Nagel testified: "Well, at that particular time, as soon as I saw the

man fall overboard, I shouted, 'Man overboard', I, myself, grabbed for the rope sling, and tried to throw it at him. When I looked over the side with the sling in my hand I saw two (the) men was astern already" [Apostles, p. 144]. Seaman Gibson testified: * * * "I heard these fellows running forward along the (deck) house, and I heard them and I looked out to see what was going on and I seen them all excited and looking outside * * *" [Apostles, p. 107]; while Gallagher testified: "They stood there; they didn't attempt to do anything", and again: "No, they didn't attempt. Just stood there looking around" [Apostles, 172].

POINT II.

Even when the Brunswick arrived opposite or abreast the dredges, Johannesen, who was working on a dredge, upon hearing the cry of "Man overboard" frow the Brunswick, "throwed away his tools, jumped in the skiff, untied it, and himself alone pulled this heavy working boat to the deceased and got there just as he sank, the Brunswick being much closer to the deceased at the time he heard the cry of 'Man overboard' than what he (Johannesen) was" [Apostles, pp. 187, 188, 189].

Issue XII.

The court further held: If it could be said that deceased could have been saved if proper and efficient life saving appliances not on board the Brunswick had been there, and had been used with reasonable prompti-

tude and efficiency by the officers and crew thereof, then, of course, there would have been strong reason for supporting the conclusions arrived at by the commissioner, but that it should be borne in mind that it was stipulated that such equipment was there at time of inspections made both prior to and subsequent to the accident, and that there was no suggestion from any source of any change, and that the captain testifies that the usual and proper life boats and life buoys were on board and in their proper place.

In these findings the court seems to have laid great stress on the stipulation of proctor for libellant, who stipulated that she was fully equipped, at inspections made by the local inspectors, Steamboat Inspection Service, prior and subsequent to the accident. Being fully equipped, means having the required number of life boats, life buoys, etc., on board.

A reference to these stipulations will conclusively show their immateriality, in that they admit that the Brunswick was, upon an inspection made in December, 1921, about four months preceding the cause of action herein, found to be fully equipped (i. e., having the necessary number on board), by the local inspectors, Steamboat Inspection Service, and again, after the cause of action arose, as naturally would be inspected. The self-serving conclusion of the master, i. e., no change, testified to over objection of libellant's proctor, and accepted by the court, should have been ignored, not only because he testified to a self-serving conclusion over objection, but for other and more important

reasons hereinafter set forth. Indeed, there is no dispute as to the number of life-saving appliances required by law being actually on board the Brunswick at all times. The utility of these may, however, be rendered a nullity for life-saving purposes, and contrary to the letter and spirit of statutory law, hereinafter set forth, by the following conditions:

(a) Using the life boats as auxiliary storerooms;

(b) Securely stowing them on board with lashings, boat covers, stowing the boats' falls in the boats instead of having and keeping the boats in such a condition at all times that they can be immediately lowered;

(c) Placing all life preservers together for convenience or to suit the whims of the master or mate, and having them tied for a full due (permanently), instead of placing them in such a position that one would be available in the different parts of the ship, so that if a man fell overboard on the starboard or port side, forward or aft, the man nearest could grasp and throw a life buoy at once to him. It must be noted that a life buoy can be thrown but a very short distance, and to add to this the weight of 15 fathoms (90 feet) of line, renders the life buoys kept on the extreme stern of the ship absolutely useless, as the ship going ahead would have naturally gone further while a man was running to the stern of the ship, than he could throw the life preserver with 15 fathoms of line as thick as a fountain pen attached.

(d) While a ship may have two boats on board, they are not and cannot be regarded as life boats unless

and until they are so rigged and equipped that they can be immediately launched at all times and under any and all weather conditions. Similarly, too, life buoys are only useful when they are so placed to be immediately available to be thrown to a man who falls overboard.

Even at the risk of repetition, let us ascertain from the testimony the actual condition, accessibility and availabiliy of these life-saving appliances for use intended, and as required by law:

There were but two boats on board the Brunswick [Apostles, p. 89].

The chief engineer testified that the port life boat was the best to get over (launched), and that the deceased fell overboard on the starboard side, and that no effort was made to get the starboard life boat adrift. [Apostles, p. 206, top.]

The first mate testified that there was a hawser coiled in the port life boat, that it was the working life boat, that she was secured in the skids, having lashings on, boat cover on, which was tied by stops (small ropes, which, when wet, or damp, as is usual in a vessel coming from the north in month of April, are very difficult to untie) tied under the keel [Apostles, p. 220]; that he had to clear the halyards (meaning the boat falls or purchase tackle); the halyards are generally inside the boat [Apostles, p. 219].

Courts will judicially notice all matters of science involved in the case being tried. Brown v. Piper, 91

U. S. 37. Hence courts of admiralty will judicially notice that the smallest hawser is 5″ in circumference and 120 fathoms in length. This is too heavy and cumbersome to be thrown out of boat by even four men, and the quickest way to get it out of a boat is by coiling it on deck, and if wet or damp would be full of kinks, etc., and would take two well trained men at least 20 minutes to so coil it.

The Brunswick had four life buoys, and these were hanging at the taffrail or stern rail [Apostles, p. 114], and, as testified by Gallagher [Apostles, p. 168], and positively reiterated in his testimony [Apostles, p. 175], was secured to the stern rail with a piece of line about the size of a fountain pen and tied with a square knot, which when wet is very difficult to untie, and so found by this witness, who (like all other water front men), is familiar with knots.

Now, with reference to life saving appliances, the United States statutory law on the specific requirements of life boats and life buoys will be found in Barnes' Federal Code, page 1779, subheading:

> "Handling of the Boats and Rafts.
>
> "All the boats and rafts must be stowed in such a way that they can be launched in the shortest possible time, and that, even under unfavorable conditions of list and trim from the point of view of the handling of the boats and rafts, it may be possible to embark in them as large a number of persons as possible."

Again, in Barnes' Federal Code, page 1784, under subheading:

"Life Jackets and Life Buoys.

"* * * Fifth. All the life buoys and life jackets shall be so placed as to be readily accessible to the persons on board, their position shall be plainly indicated so as to be known to the persons concerned.

"The life buoys shall always be capable of being rapidly cast loose, and shall not be permanently secured in any way."

Again, in Norfolk Southern R. Co. v. Foreman, 244 Fed. Rep. (C. C. A., 4th Cir., July 16, 1917) 360, which was a case analogous to the instant case, it was held that:

"The evidence does not seem to show that the blow struck by the tug on the barge when approaching for the purpose of making fast in the stream was of extraordinary or unusual violence. Neither the tug nor the barge appeared to have been injured. The coming together of two such boats in midstream, both more or less in motion, is always accompanied by some jar or thump, and there is nothing in the testimony to show that the contact in this case was more violent than is usual in similar cases. There does seem to have been delay in the efforts to rescue Skinner, due to the absence of the best facilities. The deck hand who endeavored to throw the line, had a line apparently too heavy for him to fling far enough to reach Skinner where the latter was in the water, although a lighter line might have accomplished the

purpose. *There was no ring buoy or life preserver at hand at that juncture for the deck hand to fling to Skinner.* The deck hand had to go up the side of the house of the tug to the deck above near the pilot house, and break open a box to get out a life preserver, and when he flung the life preserver the tug had drifted so far from Skinner the life preserver failed to reach him. From all the evidence it would appear that the drowning was the result of a chain of circumstances. Skinner was too inexperienced or too careless to handle himself on the runway of the barge, and the unexpected (to him) force of the jar and sheer caused by the tug striking the barge, precipitated him overboard. He seems to have been unable to swim, and the lack of having at hand the proper facilities on the tug to rescue him, caused a delay which made the efforts at rescue futile.

"Assuming that Skinner's ignorance and inexperience, with the act of the captain in putting him in a dangerous position, were not in issue, as not having been alleged in the libel, then the decree of the court below, construed as being responsive to the libel, found as a conclusion of fact that the respondent was guilty of negligence in one or both of the particulars charged in the libel. It seems to this court that if an employer requires its employees to work in a place where they may be subjected to the danger and peril of being precipitated into the water, as in the present case, there should be provided devices and facilities reasonably fit and accessible to ward off a fatal *eventuation by effecting a rescue if reasonably possible.*"

In re Reichert Towing Line, 257 Fed. 214, C. C. A. 370, held:

> "However, even in tort cases, where there is no contractual liability, one relying upon inevitable accident as a defense must either point out the precise cause, and show that he is in no way negligent in connection with it, or he must show all possible cause, and that he is not in fault in connection with any one of them."

Certiorari denied. 248 U. S. 565.

Issue XIII.

That the partner of the deceased, a longshoreman, after deceased fell into the bay, started to throw a life preserver to him, obviously though working upon it, due perhaps to his excited state he did not know how to remove it from its appropriate receptacle. Instead of lifting it up, as he should have done, and merely breaking the twine which held it in place, apparently he was attempting to put it down through a fixed rack. This occupied some minutes. Before, however, he had succeeded in releasing the buoy, one of the sailors came running up, and without difficulty took it from its place.

Here the court, contrary to commissioner's finding of fact, rejected the positive and reiterated testimony of Gallagher, and accepted the testimony of that embryo seaman, Gibson.

Issue XIV.

Very likely the partner of the deceased working on the life buoy deterred some of the sailors from going to it and throwing it overboard. Without doubt it was thought that the partner of the deceased would do that what he was trying to do, to wit, throw a life preserver to the deceased.

There is no evidence at all in the record about this finding, nor is there any usage, or custom of the sea, or any known principle of admiralty law which authorize or even condone the delegation by supposedly trained men of their life saving duty to others, especially to those of unknown qualifications in that respect. The adoption of such a rule would be to introduce into admiralty law and seamen's practice, a novel and dangerous doctrine, and one opposed to the humane spirit of admiralty law, and to the steady modern trend of judicial decision.

Issue XV.

That the deceased having fallen overboard, due to his own negligence, no recovery could be had unless it should be proven to the degree required by law, that the loss of his life thereafter was due to the neglect, want of care, and culpability of the servants of the respondent. I canont believe the proof adduced suffices to establish this conclusion, and disaffirm any conclusions and recommendations reached by the commissioner, and that if the rule, contended for by the respondent, as illustrated in Burton v. Grieg, 271 Fed.

271, be accepted, then there is less ground for a decree in favor of libellant upon the facts actually adduced.

In The Anglo Patagonian, 228 Fed. 1016, held:

> "The case turns entirely upon whose fault it was, if that of any one, that the anchor gave way, causing the injuries complained of. The anchor was undoubtedly part of the ship's appliances, and under her control, and for damages arising from the falling of the same, by reason of insecure fastening or imperfections in connection with its construction, the ship clearly, as between herself and these libellants, is liable. The ship insists that it was not necessary for her to do more than properly make the anchor fast in the hawse pipe, by the brake bank of the windlass; *that was the universal custom when in port and in dry dock in this country,* though in Europe it was customary to lower the anchor to the bottom of the dock, when in dry dock.
>
> *"It seems to the court that the test of the sufficiency of what the ship did in this case should be determined in the light of the result that followed.* Upon the whole case, in the judgment of the court, it is clear that as between the ship and these libellants, she is responsible for the injuries of the latter."

In this connection attention is respectfully invited to R. S. Sec. 4602, Sec. 7615, Barnes' Federal Code, which reads as follows:

> "Any master of, or any seaman or apprentice belonging to, any merchant vessel, who, by willful breach of duty, or by reason of drunkenness, does

any act tending to the immediate loss or destruction of, or serious damage to such vessel, or tending immediately to endanger the life or limb of any person belonging to or on board of such vessel; or who by willful breach of duty, or by neglect of duty, or by reason of drunkenness, refuses or omits to do any lawful act proper and requisite to be done by him for preserving such vessel from immediate loss, destruction, or serious damage, or for preserving any person belonging to or on board of such ship from immediate danger to life or limb, shall, for every such offense, be deemed guilty of a misdemeanor, punishable by imprisonment for not more than twelve months. (R. S. 4602, Act June 7, 1872, c. 322-54, 17 Stat. 274.)"

Obviously the court ignored the doctrine of *res ipsa loquitur*, so carefully considered and explained by the Circuit Court of Appeals for the Ninth Circuit, in The Joseph B. Thomas, 86 Fed. 662.

Further, as the right of action in this case was given by the statutes of the state of California, Western Fuel Company v. Garcia, *supra,* the following cases are illuminating:

In Lippert v. Pacific Sugar Corporation, 33 Cal. App. 199, which was "an action for damages":

> "This is an action for damages brought by the surviving wife and minor child of William Leo Lippert, who, on the fifteenth day of July, 1909, was killed by the bursting of a 'pre-heater,' used by defendant for the purpose of heating sugar beet juices. At the time of the accident, Lippert

was twenty-eight and one-half years of age, and the minor child was eighteen months old. The jury found for plaintiffs in the sum of twenty thousand dollars and judgment was entered in their favor for that amount. The appeal is by defendant from the judgment and from an order denying its motion for a new trial.

"Appellant makes the following points:

"1. That deceased was employed as master mechanic and was entrusted with the oversight of all the machinery of the sugar-house;

"2. He, therefore, assumed the risks of his employment;

"3. Contributory negligence on the part of the deceased;

"4. He fully knew and appreciated and apprehended all of the dangers surrounding his employment;

"5. That if the pre-heater was out of repair it was patent to the deceased and it was his duty to have remedied its condition;

"6. If that was the condition of the apparatus, he should have complained of it to defendant;

"7. When deceased was employed as mechanic and assistant superintendent, he expressly assumed the duty of putting all machinery into thorough running condition.

"Upon the close of plaintiffs' case, defendant moved for a non-suit on the grounds:

"1. That no negligence on the part of defendant had been shown;

"2. Deceased was guilty of contributory negligence;

"3. Deceased assumed the risk of the employment.

"The court denied the motion of non-suit.

"In Shoarmen and Redfield on Negligence, section 60, the following rule is declared: 'Where a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.' In Rose v. Stephens etc. Co., 11 Fed. 438, it is said: 'In the present case the boiler which exploded was in the control of the employees of the defendant. As boilers do not usually explode when they are in a safe condition, and are properly managed, the inference that this boiler was not in a safe condition or was not properly managed, was justifiable.' It was further said that, while the rule is more frequently applied in cases against carriers of passengers than in any other class, there is no foundation for limiting the rule to carriers. 'The presumption,' said the court, 'originates from the nature of the act and not from the nature of the relations between the parties.'

"The cases are industriously cited and considered in Judson v. Giant Powder Co., 107 Cal. 549, 48 Am. St. Rep. 146, 29 L. R. A. 718, 40 Pac. 1020. Referring to the case of Young v. Bransford, 12 Lea (Tenn.) 232, which supports a contrary doctrine, attention is called to the following language in the reported opinion of that case: 'At

the same time, the fact that there was an explosion, which is not an ordinary incident of the use of a steam boiler, ought to have some weight, inasmuch as it may be out of the power of the aggrieved party in some instances to prove any more. The reasonable rule would seem to be that laid down by Judge Wallace: 'That from the mere fact of an explosion it is competent for the jury to infer, as a proposition of fact, that there was some negligence in the management of the boiler, or some defect in its condition.' We are satisfied that this is a case where the doctrine of *res ipsa loquitur* is applicable, and plaintiffs are not precluded from relying upon it because they charged specific omissions of duties or acts of negligence. This latter proposition is well supported in Cassady v. Old Colony Street Ry. Co., 184 Mass. 156, 63 L. R. A. 285, 68 N. E. 10, where it was said: 'The defendant also contends that even if originally the doctrine would have been applicable, the plaintiff had lost or waived her rights under that doctrine (*res ipsa loquitur*), because, instead of resting her case solely upon it, she undertook to go further, and show particularly the cause of the accident. The position is not tenable. It is true that, where the evidence shows the precise cause of the accident, as in Winship v. New York, N. H. & H. R. Co., 170 Mass 464, 49 N. E. 647, and similar cases, there is, of course, no room for the application of the doctrine of presumption. The real cause being shown, there is no occasion to inquire as to what the presumption would have been as to it if it had not been shown. But if, at the close of the evidence, the cause does not appear,

or if there is a dispute as to what it is, then it is open to the plaintiff to argue upon the whole evidence, and the jury are justified in relying upon presumptions, unless they are satisfied that the cause has been shown to be inconsistent with it. An unsuccessful attempt to prove by direct evidence the precise cause, does not stop the plantiff from relying upon the presumptions applicable to it.

The judgment and order are affirmed.

Burnett, J. and Hart, Jr., concurred.

A petition to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on May 10, 1917."

Also,

Soto v. Spring Valley Water Co., 39 Cal. App. 188.

Finally the court erred in overruling the findings of the Commissioner. It will be observed that by stipulation of the parties, and in pursuance thereof, the court made an order of reference directing him to take testimony, make findings of fact and recommend appropriate conclusions of law, and judgment and decree, and that all witnesses personally appeared before the Commissioner.

"The finding of a commissioner will not be disturbed as to matters of fact upon which the evidence is doubtful, or the inferences are uncertain, much less involve to a greater or less degree the credibility of witnesses."

"Panama R. Co. v. Napier Shipping Co., 166 U. W. 280, 17 Sup. Ct. 572, 41 L. Ed. 1004; The Oceanica, 156 Fed. 306; The Minniehaha, 151 Fed. 782; The North Star, 151 Fed. 168, 80 C. C. A., 536; The Mobila, 147 Fed. 882; The La Bourgogne, 144 Fed. 781, 75 C. C. A. 647, affirmed 210 U. S. 95, 28 Sup. Ct. 664."

In Petition of Diamond Coal & Coke Co., 297 Fed. 242, at page 245, Judge Thompson said: (Affirmed 297 Fed. (C. C. A. 4th Cir.) 246)

"But the Commissioner saw the witnesses and heard them testify, and this is a matater of substantial importance. When the evidence is transcribed to the written page, much of value bearing on its probative force is wholly lost. It can then only be measured by the words which the witness used. The character and make-up of the witness as disclosed by his appearance; his manner of testifying; his apparent candor or lack of it; his hesitancy, arising from uncertainty as to the fact, or his positiveness, based on the certainty of conviction—these and other like considerations may be largely controlling in determining the credibility of a witness and the weight to which his testimony is entitled. The opinion of the Commissioner, therefore, is entitled to great weight on the questions of fact as to defendant's negligence, and the amount of damage resulting therefrom. Negligence on the part of the petitioner has been found by the Commissioner, and he has, after the taking of considerable testimony, fixed the amount of damage resulting to each of the respondents."

Again, in Luckenback v. Delaware, L. & W. R. Co., 168 Fed. 560, where Judge Adams said:

> "This order was entered upon the consent of the parties. Subsequently the Commissioner reported that the libellants were entitled to recover a certain amount, and the respondent thereupon excepted. The present motion to dismiss was then made. The libellants urge that the exceptions can not be considered because the whole matter was referred, and the respondent's only remedy is by an appeal. It seems that this point is well taken. When the court and the parties agreed that the matter should be heard and determined by the Commissioner, apparently the court had no supervising powers over his action. It then became similar to the familiar practice in the state courts and the United States Circuit Court of using referees to assist in the work of the court, the referees in such cases being invested with the full power of the court in the respects mentioned, necessarily excluding any revision by the court. The respondent argues in opposition that the order in question, after directing the Commissioner to hear and determine all the issues, also directed him to report to this court, and it is still within the power and is the duty of the court to make its own decree with reference thereto. The decree here, of course, must be made by the court. That power, under the practice prevailing here, could not be delegated and it is still necessary that the decree should be the court's, but that does not prevent the court, with the consent of the parties, from appointing a person to pass upon the law and

merits of the controversies involved, without review by the court.

The exceptions are dismissed."

In reference to "Inevitable Accident" set up by respondent *in re* Reichert Towing Line, 251 Fed. (C. C. A. 2nd Cir.) 217, held:

> "However, even in tort cases, where there is no contractical liability, one relying upon inevitable accident as a defense must either point out the precise cause, and show that he is in no way negligent in connection with it, or he must show all possible causes, and that he is not in fault in connection with any one of them." Certiorari denied 248 U. S. 565.

Referring now to the effect of the plea of contributory negligence of respondent herein, in Murray v. Southern Pacific Co., 236 Fed. (C. C. A. 9th Cir.) 704, the court held:

> "Contributory negligence is the want of ordinary care upon the part of the person injured by the ACTIONABLE NEGLIGENCE of another combining and concurring with that negligence to produce the injury, and therefore THE DEFENSE OF CONTRIBUTORY NEGLIGENCE CONCEDES THAT THERE WAS ACTIONABLE NEGLIGENCE ON THE PART OF THE DEFENDANT."

Exemplary Damages.

In Standard Engineering Co. v. Oriental Bulkhead Improvement Co., 226, Fed. 196, the 4th Circuit Court of Appeals held:

> "This evidence tended to show, not only negligence, but wantoness, and warranted a finding of both compensatory and punitive damages."

Again, in Whitmer v. El Paso and S. W. Co., 201 Fed. (C. C. A. 5th Cir.) 198, held:

> (4) The statutes allowing damages for wrongful act or neglect causing death have for their purpose more than compensation. It is intended by them, also, to promote safety of life and limb, by making negligence that causes death costly to the wrongdoer."

Again, at page 200 of the same decision, that court, citing a number of decisions, including 91 U. S. 489, held:

> "Negligence, which shows a reckless indifference to consequence and to the rights and safety of others, is the equivalent of willful wrong, so far as concerns the allowance of exemplary damages. The court then went on to say: 'When a person from his knowledge of existing circumstances and conditions is conscious that his conduct will probably result in injury to others, and yet, with reckless indifference or disregard of the probable consequences, although he may have no intent to injure, does the act, or fails to the act, and the injury results, there is liability for exemplary damages."

The Supreme Court of the United States, in the case cited by the Circuit Court of Appeals, 226 Fed. 200, at page 376 of 23 L. Ed. held:

> "Although this rule was announced in an action for libel, it is equally applicable to suits for personal injuries received through the negligence of others. Redress commensurate to such injuries should be afforded. In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go further, unless it was done willfully, or was the result of that reckless indifference to the rights of others, which is equivalent to an intentional violation of them. In that case, the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages.

Conclusion.

The final decree of the District Court should be disaffirmed. The findings of fact and conclusions of law of the Commissioner should be affirmed, with the single exception that interest should be allowed at 7%, the legal rate of interest prevailing in California.

The appellee's defense is purely specious, and without merit, in that in the instant case, when the cry of "Man overboard" was raised, the Brunswick had just left one dock and was proceeding to another, and this necessitated the presence of all deck officers and

crew on deck, and thus available for any emergency. The ship was going very slowly, or about 2 or 3 miles per hour, with full head of steam in boilers, and in the Inner Harbor of San Pedro, with a gang of water front workers (longshoremen) on board, ready, able and willing to respond to any call. There was absolutely no concerted action taken. No orders given by the captain, who appeared to have stood hopelessly helpless and dumb-founded and incapable of doing anything except to watch; the first mate, instead of immediately assuming a position of direction, supervision and seamanlike control of operations reasonably conducive to the rescue of the man overboard, according to his own testimony, walked all around and walked aft, getting to his position aft where lifeboat was, and found life buoy on deck, although Gallagher also went from top of forward lumber pile to stern, and spent 4 to 6 minutes trying to get the life buoy adrift there. When the first mate arrived aft he immediately assumed and retained a position of observation.

The captain, first mate, chief engineer, seamen Gibson and Nagel, saw everything that happened, and many things that did not happen, as heretofore pointed out, thus negativing any other activities on their part. They did nothing but watch, and the record fails absolutely to disclose a single efficient, or any, effort towards rescuing the man overboard.

Appellee's vessel, "Brunswick," according to testimony of its own witnesses, was absolutely unsea-

worthy in respect (a) the stowage, inaccessibility and unavailability of lifeboats and life buoys;

(b) Incompetent master, officer and crew;

(c) Inadequate number of crew on deck.

There was an entire absence of any proof of "Man overboard," fire, or abandon ship drills, as required by law, and immemorial usages of the sea, each of which involves the rapid launching of all life boats, and the effective use of life buoys, life preservers, and life rafts. At these drills every officer and man, including engineer's force, stewards, cooks, etc., has assigned to him a particular station and specific duty at that station.

The fact that the lifeboats were used as auxiliary store rooms, and securely lashed with boat covers on, etc., the placing of all life buoys together at stern of ship and securing them there, all manifest the incompetency of the master, officers and crew, which has been otherwise conclusively established, and demonstrate their wanton disregard of the humane usages of the sea, the statutory law applicable to the stowage, accessibility and availability of lifeboats and life saving appliance, and their reckless indifference to the rights and safety of those on board.

To permit appellee to escape liability would be destructive of the most cardinal principle of admiralty law, i. e., inherent natural justice, and would be conducive to the promotion of culpable inefficiency and criminal negligence on board ships, where the safety

of ship, cargo, and human beings on board, demand the highest order of efficiency, training and discipline, in order to meet the ever varying perils of the sea, and unforeseen contingencies incident thereto.

Wherefore, it is respectfully submitted and prayed that the findings of fact, conclusions of law, and recommended judgment and decree of the Commissioner, be by this Honorable Court affirmed, with interest of 7% from date of death, April 18, 1922.

Dated, San Pedro, California, September 19, 1924.

JOHN J. MONAHAN,
Proctor for Appellant.

No. 4308.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

CHRISTINA M. HOEFFNER, as Administratrix of the Estate of JOHN H. HOEFFNER, Deceased,

Appellant,

vs.

NATIONAL STEAMSHIP COMPANY,

Appellee.

BRIEF FOR APPELLEE.

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Appellee.

BRIEF FOR APPELLEE.

By reference to appellant's brief it will be observed that appellant disagrees with the conclusions of the Court with respect to the evidence in the case.

CONTENTIONS OF APPELLEE.

It is the contention of appellee:

First: That there was absolutely no negligence on the part of the National Steamship Company, either in connection with the happening of the accident or in connection with the attempt to rescue the deceased after the accident.

Second: The act of the deceased in falling from the load of lumber into the water was solely a result of his own carelessness.

Third: That the evidence does not support the allegations of the libel.

From the opinion of Judge Bledsoe, hereinafter set forth in *haec verba,* it will be observed that Judge Bledsoe, after very carefully considering all the evidence in the case, found that there was no evidence legally sufficient to justify the findings of fact and conclusions of the commissioner. The Court reached its opinions from the undisputed testimony and such presumptions as could be drawn from such testimony and did not consider testimony in which there was a substantial conflict.

OPINION OF THE UNITED STATES DISTRICT COURT.

Bledsoe, District Judge:

This case is before the Court upon exceptions to the Commissioner's report. The Commissioner, having heard the case under an order of the Court directing him to take testimony, make findings of fact and recommend appropriate conclusions of law and judgment and decree, has made certain findings and as conclusions of law has recommended that the libelant recover of the respondent the sum of $14,400.00 compensatory damages, and $1,000.00 additional as exemplary or punitive damages.

I have given the case very careful and earnest consideration and can arrive at no conclusion satisfactory to me other than that the judgment and recommendation of the Commissioner should not be confirmed by the Court.

The suit was for a recovery for damages sustained by the libelant because of the death of her husband, referred to herein as the deceased, while engaged as a longshoreman in the unloading of the cargo, or a portion thereof, of the schooner "Brunswick". It was alleged in the libel that while deceased was engaged in the performance of his duties and while the ship was proceeding upstream in the harbor at San Pedro, and while the deceased was engaged in making up slings of lumber so as to have them ready when the unloading of the vessel should begin, "the sling yielded a little so that he tripped and fell overboard; that there were no life lines or life rails on the side of said vessel where the deceased was working so that he could be protected; that the said vessel negligently continued on her way after the deceased was precipitated into the water, and she proceeded about five hundred feet upstream before stopping; that no boat was lowered to pick up the deceased and that there were no life buoys thrown and that no efforts were made either by the master or crew of the said vessel to save the deceased, and that as a result thereof the deceased came to his death by drowning."

The Commissioner's findings are not based apparently upon the allegations made in the libel, but proceed upon a different theory, probably a theory developed on the hearing. Seemingly this is not contrary to established principles of admiralty practice. The findings made by the Commissioner are to the effect that after the "Brunswick" cast off from the San Pedro Lumber Company's dock, the first mate, having charge of the unloading of the lumber, ordered deceased to

sling up the lumber, and in obedience to said orders it was necessary for him to go on top of the lumber pile. "The lashings of this lumber pile had previously been removed and the top was a disordered mass of lumber"; that deceased, in company with his working partner, went on top of the lumber pile, deceased being on the outboard side, it being necessary to start slinging from the outboard side, and that "immediately upon getting to his working position, and trying to pull the slings through on the extreme starboard side of the ship, the said John H. Hoeffner stepped on a plank, which tipped, and then stepping on another plank which tipped too and precipitated him overboard and he was drowned"; that there were no life lines, life rails or other protection outboard of this lumber pile, which, while a vessel was under way in a narrow harbor and being subject to pitch or roll from the wash of propellers of other vessels, or to the sudden jar of hitting or being hit by other vessels or obstructions, was a dangerous place to life and limb to those who were required to work thereon; that deceased was precipitated overboard a few minutes after the "Brunswick" got under way, the speed of the vessel at that time being about two or three miles per hour; that the vessel did not immediately stop when the cry of "man overboard" was raised; "that no lifeboat was lowered, no life preserver, life buoy, or piece of lumber was thrown from the 'Brunswick' to said John H. Hoeffner, after he was precipitated overboard and was struggling in the water, and that no efficient efforts were made to rescue him by the master, officers and crew of the said ship 'Brunswick',

and that the lifeboats and other life-saving appliances of the said ship 'Brunswick' were not, at the time that said John H. Hoeffner was precipitated overboard therefrom, reasonably fit and accessible to effect his rescue, and that the master, officers and crew of said ship 'Brunswick' were incompetent and culpably inefficient in the performance of their duties in matters pertaining to the handling of the ship and in the use of the ship's life-saving appliances".

It is further found that deceased had been engaged in working as a longshoreman only a few months; that he had no means of ascertaining the condition of the lumber pile on which he was required to work until he got on top thereof, "when he was immediately precipitated overboard". That he had no means of ascertaining the incompetency of the master and crew of the vessel; that the danger confronting him was a latent and not an obvious danger; that he was not guilty of contributory negligence, but acted in a careful, cautious and prudent manner. It is then further found that the deceased came to his death by drowning in the harbor of San Pedro while in the employ of the respondent on board the "Brunswick", "and that said death was caused by the failure of the respondent to furnish him with a safe and suitable place in which to perform said employment, and by the failure of the respondent to provide and maintain in a reasonably fit and accessible condition, proper and efficient life-saving appliances on board said ship 'Brunswick', and in the failure of the respondent to provide and maintain master, officers and crew competent and efficient in the handling of said ship

'Brunswick' and in the stowage, accessibility and use of life-saving appliances thereof".

It is obvious from a cursory inspection of these findings that some of them are immaterial in that they have no causal relation to the untimely death of the deceased. With respect to others, a careful study of the evidence impels me to the conclusion that they are unfounded and unjustified in so far as the evidence is concerned. For instance, it is not the fact, obviously, that deceased was precipitated overboard and into the water "immediately upon getting to his working position". The evidence of the partner of the deceased and of the winchman who stood on the top of the deckload was to the effect that deceased and his partner had been working in the attempt to get the sling around a sling of lumber for at least several minutes. There is some conflict in the evidence as to whether or not deceased and his partner actually laid the lumber for the sling upon which he was then working, one testifying one way and another another; but, in any event, it is clear that the deceased had been for some considerable time, that is, at least several minutes, on the top of the deckload before he fell therefrom.

The finding that there were no life lines, life rails or other protection outboard of the deckload of lumber, and that in consequence, because of the liability to pitching and rolling from the wash of the propellers of other vessels, or the sudden jar of hitting or being hit by other vessels or obstructions, the place was a dangerous one, is obviously irrelevant and untimely. There is no suggestion anywhere in the rec-

ord that any wash was occasioned by any other vessel, and no suggestion anywhere that anything struck or was struck by the vessel on which the deceased was employed.

Counsel for libelant examined the captain and other members of the crew of the "Brunswick" as to certain matters of seamanship and the like, which were wholly irrelevant to any inquiry pending before the Commissioner. From this examination, counsel himself being an expert seaman, it is sought to deduce the inference that the captain and the members of the crew were inexpert and, as found by the Commissioner, "incompetent and culpably inefficient in the performance of their duties". It would make little difference how inexpert and incompetent the master and members of the crew were with respect to seamanship generally if, at the time of the happening of the accident in question, they acted with due promptitude and without any negligence on their part with respect to the matters and duties *then* devolving upon them. So, irrespective of the wide range of the examination conducted by counsel, the question really is, Did the master and members of the crew fail in any duty *then immediately devolving upon them?*

It is the fact that no life lines or life rails or other protection was placed around the top of the deckload of lumber, but I cannot bring myself to believe that such circumstance is sufficient to charge respondent with liability. Deceased was sent to the top of the lumber pile in broad daylight, a little after 8 o'clock in the morning. There is no suggestion from any source that he could not see perfectly what was up

there, what he was expected to do, and the conditions under which he was called upon to perform the labor involved in the completion of his task. If, going up on the top of the lumber pile in the dark, with no opportunity to see or examine the conditions surrounding him, he had been precipitated overboard, a different question would be presented. I know of no rule of conduct a violation of which would give rise to a charge of negligence which says that where a man is called to a task in broad daylight, of the sort here under consideration, a railing must be built around him to protect him from falling off or overboard. The testimony in the case is that such rails were never put around the tops of deckloads of lumber, and there is nothing so inherently dangerous in the position as to suggest the necessity for a line or rail. At best, the top of the deckload could not have been more than twelve or fifteen feet from the surface of the water; there was no unusual height calculated to disturb one's poise, and it seems clear to me that, conceding the place in which deceased had to work to be at all dangerous, the deceased, in accepting the employment, was called upon to exercise greater care because of the greater risk that was involved. It is not found that if a line or rail or other protection had been under, at, or near the top of the lumber pile, it would have prevented deceased from falling overboard. If one had been built and was reasonably necessary as a matter of duty devolving on the respondent, it would have had to have been lowered as the deckload was lowered in order to be a continuing protection to a worker on the top of the lumber pile. To me the situation is

not at all dissimilar from that afforded by an every-day sight, the repairing of something contained beneath a manhole, at the top of which a man is stationed to assist the man below or to ward off travelers and the like. In a moment of inattention to his surroundings, the man thus employed steps into the manhole and is injured. With as great reason as that urged in the case at bar, it could be urged in such an instance that some rail or protection should have been built around the manhole to protect the man who was watching it from falling into it.

Having full powers of observation, full opportunity to know and appreciate the dangers attendant upon the performance of his duties in the place in which he had to perform them, deceased was under the duty of exercising a care and protection of himself in keeping with the situation in which he found himself. This he did not do, under the evidence, because from undisputed testimony he stepped, *not once, but twice,* upon a plank which was a part of the sling load he was trying to arrange, and the plank being placed slantwise across the block supporting the sling load, it turned or twisted, and the second time he stepped upon it, it turned sufficiently to cause him to lose his balance and he fell into the bay. One of the witnesses testifies that he saw deceased step upon this plank twice; that the first time he did so the witness felt that his procedure was unsafe and insecure; that is, he felt that the deceased was not exercising due and proper care, considering the place in which he was engaged. My own conclusion, therefore, from the evidence, is that deceased was precipitated into the

water not because of any negligence of the respondent or any of its employees, but because of a want of care on the part of deceased himself, *i. e.,* because of his own contributory negligence.

It is next asserted that no life preserver or piece of lumber or anything was thrown down to the deceased when he was in the water. This may be accepted as true in view of the Commissioner's findings, although there was some evidence to the effect that one of the life-buoys on the ship was actually thrown down into the water. There is no testimony in the case as to the direction or speed with which the water in the channel was moving, if at all. Apparently it must have been moving, because the deceased very rapidly either swam, that is, "paddled," or drifted, beyond the stern of the boat. The evidence to my mind establishes the fact that the captain stopped the vessel with all the celerity he could command, in view of the circumstances. The vessel was heavily laden apparently, proceeding under power up the channel when the accident occurred. It is obvious it could not be stopped immediately, and an approaching vessel had to be taken into consideration. Counsel for libelant quotes at some length from the Rules of the Road respecting one vessel overtaking another, etc.; but it should be remembered that these rules apply where the vessels are *proceeding normally,* and that, obviously, the rules could not apply, at least in an unqualified degree, where one vessel, the one being overtaken, is compelled, because of some exigency arising, to change its normal course of procedure and either stop or turn around or the like. Under such

circumstances, obviously, in a narrow channel like that at San Pedro, there was a duty devolving upon the master of the "Brunswick" to exercise care that he should not, in his endeavor to extend succor to the deceased, do that which would bring other lives or other property into danger. It should also be kept in mind that there were upon the water at that time two or three small craft, two of them power boats, and that these small craft, becoming apprised of deceased's fall into the water, were endeavoring to render him assistance. One of them, as a matter of fact, got so close to the deceased before he finally went down, as that those on board the "Brunswick" thought deceased actually touched the craft—a pilot-boat. The person in charge of the pilot-boat threw a life preserver to the deceased and those on the "Brunswick" observed, and there seems to be no controversy with respect to that, that this life preserver landed very close to where the deceased was then being seen in the water. These circumstances—the facts that others who were able to act more quickly than those upon the "Brunswick" because they possessed lighter and quicker moving craft, and that they were using every effort to render aid to the deceased, and were nearer to him than those upon the "Brunswick" were, should be taken into consideration in determining not only the duty devolving upon the men on the "Brunswick," but also in determining the adequacy of their efforts indulged in at the time.

If the deceased had fallen overboard in a large body of water, with no one in the vicinity save those on the "Brunswick," it could easily and very properly

be claimed that a complete failure on their part to do anything in the way of endeavoring to rescue him would be chargeable as gross and indefensible negligence. However, under the conditions obtaining, with others nearer and better qualified to render assistance, the fact that the crew of the "Brunswick" did not do more than they did is satisfactorily explained.

The only finding in my judgment that is at all suggestive of a right to recover on the part of libelant is that in Paragraph Seven of the Commissioner's Report, to the effect that the death of the deceased was due to the "failure of the respondent to provide and maintain, in a reasonably fit and accessible condition, proper and efficient life-saving appliances on board said ship 'Brunswick'." If it could be said, by fair and reasonable inference, that deceased could have been saved if proper and efficient life-saving appliances not on board the "Brunswick," had been there, and had been used with reasonable promptitude and efficiency by the officers and crew thereof, then of course there would be strong reason for supporting the conclusions arrived at by the Commissioner. It should be borne in mind, however, that it was stipulated in the case that the equipment required by law was on board the "Brunswick," and that such equipment was there at the time of the inspection by the United States inspectors, both prior to and subsequent to the accident. There is no suggestion from any source of any change in condition at the time of the accident, and it must be inferred, therefore, that all the equipment required by law was upon the "Brunswick" at the time of the occurrence in question. The

captain testifies that the usual and proper life-boats and life-buoys were on board, and in their proper location. I see nothing in the testimony at all to justify a conclusion to the contrary. The reason why the life-boat was not launched is answered by what has been said hereinabove. The mate and those in attendance upon it thought the others on the bay in the lighter craft would be able to reach the deceased and extend to him the aid of which he was then in need. With respect to the life-preservers, it is a question, as above referred to, whether one was thrown into the water or not. The partner of the deceased, a longshoreman working with him, after deceased's fall into the bay, started to throw a life-preserver to him. Obviously, under all the testimony, though working upon it, due perhaps to his excited state, he did not know how to remove it from its apparently appropriate receptacle. Instead of lifting it up, as he should have done, and merely breaking the twine which held it in place, apparently he was attempting to pull it down through a fixed rack. This occupied some minutes. Before, however, he had succeeded in releasing the buoy, one of the sailors came running up and without difficulty took it from its place. He says he threw it into the water as an aid to the deceased. Whether he did or not is a question, in view of the conflict in the evidence. Assuming that the life-preserver was of the proper and appropriate sort and that it could have been removed with reasonable promptitude, the fact that the partner of the deceased was engaged in attempting to remove it very likely deterrred some of the sailors from going to it and

throwing it overboard. Without doubt it was thought that the partner of the deceased would do that which he was evidently trying to do, to-wit, throw out a life-preserver to the deceased. It becoming apparent that he was not succeeding, one of the sailors went to his assistance with the result indicated above. It does not appear, however, anywhere in the evidence, that if reasonable celerity had been employed after the crew became apprised of the fact that deceased had fallen overboard, a life-buoy could have been thrown to him or in his direction which would have had any effect upon his rescue, or would have made it possible for him to avoid drowning. Of course, the proof need not be absolute with respect to this because, in the absence of the actual occurrences, it would be impossible to say absolutely what would have resulted. But there is no testimony from which it might reasonably be inferred that if, exercising reasonable care and promptitude, a life-preserver had been thrown to the deceased, he would or might have been enabled to take advantage of it and save his life.

The deceased having fallen overboard due to his own negligence, no recovery should be had as against the respondent unless at least it should be proven to the degree required by the law that the loss of his life thereafter was due to the neglect, want of care, and culpability of the servants of the respondent. I cannot believe the proof adduced suffices to establish this conclusion, and therefore am constrained to disaffirm the conclusions and recommendations reached by the Commissioner.

The above conclusions seem to be determinative of

the matters involved, considering them in keeping with the theory of the case developed and followed by the Commissioner and the parties upon the hearing. If the rule contended for by respondent, as illustrated in *Burton* vs. *Greig,* 271 Fed. 271, be accepted, then there is still less ground for a decree in favor of libelant upon the facts as actually adduced.

The exceptions to the Commissioner's report are sustained, and the matter is re-referred to the Commissioner for a new hearing or for such other action as by the parties may be deemed appropriate.

November 13th, 1923.

BENJAMIN F. BLEDSOE,
United States District Judge.

In order to obtain an intelligent version of the manner in which the accident occurred it will be necessary to read all the testimony in the case, as set forth in the Apostles, commencing at page 72 and ending on page 232. We will, however, cite only such portions of the testimony as have a direct bearing on the issues in this case.

EXCERPTS FROM THE TESTIMONY OF WITNESSES.

"The Lumber Was Not in a Disordered Mass."

Testimony of John E. Wahlgren:

A. No, sir. The lashing was still on the lumber at the San Pedro Lumber Company's yard, most of it, I think there was two at the forward end of the

dock that was taken off, right at this dock, San Pedro yard.

Q. As a matter of fact, part of the cargo, the lumber cargo was unlashed?

A. The biggest part of the deckload was lashed on leaving San Pedro Lumber Company yard. (Apostles, pp. 74-75.)

Q. This man was on a sling on top of this lumber?

A. Yes, he was building up a sling, him and his partner.

Q. Did you see him working on this lumber?

A. Yes, I saw him working on that lumber.

Q. Who fixed the sling for him, who arranged his sling load of lumber?

A. Two of them was working there, two men was working putting the sling around.

Q. And he was one of the two?

A. Yes, he was one of the two men. (Apostles, p. 119.)

Testimony of A. Nagel:

A. His partner, the man working with the deceased, he had the sling after they piled his load and put it underneath, and the man, in order to get this load, he had to go on top of this load.

Q. You mean Mr. Hoeffner got on top?

A. Yes, on top here.

Q. And threw the sling there?

A. Yes. The top plank of it was laying in a shape like this. It wasn't exactly straight with the others, consequently when he stepped on it, it tipped.

Q. It tipped?

A. Yes. The first time I noticed it was shaking when he stepped on it the first time. The second time it overbalanced. He had the sling and was trying to take it towards the middle of the load.

Q. He had this string pulling towards the middle of the load?

A. Yes. And it tipped, he overbalanced while holding on to the thing, and him dragging that sling underneath till he came to where the big hook is. (Apostles, p. 151.)

Testimony of Patrick A. Gallagher:

I went forward, and I got a sling, to the poop deck. There was some slings on the poop deck, that is, at the end of the lumber where the winchdriver and a man—I forget whether the mast stands fore or aft—yes, it stands forward, the mast, I am pretty sure. And I unloosened one of these slings and took it down and stuck it under the lumber pile, the load we had already prepared. That is, it was prepared. We didn't prepare the loads. The loads were all prepared. That was laying on the top of the deck. I shoved the sling under and where the splice connects on the string, there was threads on that splice which was hard to get through; so he leans over the load and pulls it with his hand, and he gets it pretty near through. I said, "We will pull the sling back to get it in the center of our load." Well, in doing so, he couldn't get it back. So he stood on top of his load, exactly like that (illustrating), and he reached down to get hold of the sling and give a pull, and the board he was standing on turned, and he slipped

right off back, that is, facing the ship with his back towards the water. At that time the winch-man, he hollered, "Man overboard!" (Apostles, p. 167.)

THE BOAT WAS STOPPED IMMEDIATELY.

Testimony of J. E. Wahlgren:

Q. What did you do when you heard the cry, "Man overboard"?

A. I stopped the boat immediately.

Q. You stopped it?

A. Yes, sir.

Q. That is, you just stopped, rung the engine room alarm to stop the engine?

A. Yes, sir. (Apostles, pp. 80-81.)

Q. Your machinery responded all right, did it, when you gave the orders?

A. Yes, sir.

Q. And all of the appliances were used in stopping the boat that possibly could have been used?

A. Yes, sir. (Apostles, p. 90.)

Testimony of K. Lind:

Q. Did the boat stop immediately then?

A. Yes; he stopped the boat.

Q. In your experience as a sailor, based on this experience that you have testified to that you have had, is it possible to stop a boat immediately—I mean without it moving forward at all, after an order is given?

A. No. If the boat has headway, making headway, if you stop, especially if the vessel is loaded, see, she wouldn't stop right away.

Q. If you slam on everything you have got, it won't stop immediately, will it?

A. No.

I think that is all. (Apostles, p. 125.)

Testimony of Wm. D. Brown:

Q. From your experience as chief engineer of that boat, would you say, with your knowledge of its equipment and its engine, would you say it was stopped and backed as quickly as it could have been?

A. Yes, sir. (Apostles, p. 203.)

THE CREW IMMEDIATELY STARTED TO LAUNCH A LIFE BOAT, BUT BEFORE IT COULD BE LAUNCHED, TWO LAUNCHES, EQUIPPED WITH ENGINES, AND A ROW BOAT REACHED THE SCENE WHERE THE DROWNING MAN SANK.

Testimony of John E. Wahlgren:

A. Before I had a chance to turn the "Brunswick" around or to do anything of the kind to rescue the man there was a boat and two launches at the man already and when I got the head on the "Brunswick," getting ready to get the boat ready to go to the man the man was already drowned. (Apostles, p. 82.)

Q. And you say that they were lowering a lifeboat, started to lower—

A. They started to get one ready to lower.

Q. Were there any other buoys thrown from any other boat or vessel to this man other than the one that was thrown from your vessel?

A. The pilot boat coming up the bay, the man in

charge of the pilot boat, he throwed a buoy on top of the man.

Q. Where did that buoy that the man from the pilot boat threw, strike, with reference to the man who was in the water?

A. He throwed it as near as he could possibly get.

Q. And you say it lit on top of him?

A. Just about, the man was at the time, when he seen it, the man was ready to sink, and he throwed this life ring as close to him as he could.

Q. It struck on top of the man?

A. Almost, as near as I could see. I was watching.

Q. What you are talking about now, this life buoy the pilot man threw that struck on top of him, you saw that with your own eyes, did you?

A. Yes, sir. (Apostles, pp. 89-90.)

Testimony of Gibson:

A. Well, I throwed that life preserver as quick as I got up there.

Q. After that, that was when the vesel stopped, was it?

A. They were getting the boat ready but I didn't go to the boats because I was attending to the life preserver. (Apostles, p. 105.)

A. That was all I know—what happened. I had a life preserver and they were getting the life boats ready to go after this fellow and then there were two launches, one launch and that boat from the dredger. Then we sung out for them to get to this fellow. I was singing out like anything myself to draw attention of those fellows to come to this drowning fel-

low, and this pilot boat, what they call it, I know it was a white painted boat, that was coming up the river and he got close to this man what got drowned and I don't know if he reached him. I didn't see him throw a life preserver but I think the man in the launch reached for the drowning man and he got his hat. (Apostles, p. 105.)

Testimony of K. Lind:

Q. When you saw him go down how many boats were there up around there, the immediate place where he went down?

A. There was three boats.

Q. What size were those boats?

A. Well, there was one skiff there pulled by hand and two gasoline launches. (Apostles, p. 121.)

Q. Did you see any other boat or boats around the point where this man sank? (Apostles, p. 153.)

Testimony of A. Nagel:

A. I did.

Q. How many were there?

A. There was one launch going along the pipe line towards the northern end. I was whistling to them and shouting and they didn't hear me. And there was a pilot launch, a white-painted launch, and a skiff.

Q. Did those launches or boats come up to the place where the man sank?

A. The pilot boat came first. The rest of them came later on.

Q. Did you see any life buoys or lines thrown from any of those boats?

A. One was thrown from the pilot boat.

Q. You heard the cry "Man overboard!" or you gave——

A. I gave it myself.

Q. What happened to your boat immediately after that cry? Did it stop or slacken speed?

A. Yes. (Apostles, pp. 153-154.)

Testimony of Wm. O. Brown:

Q. How long have you followed the sea?

A. 25 years.

Q. Have you seen life boats of the kind that were on the "Brunswick" lowered?

A. Yes, sir.

Q. And you know how they were equipped at that time?

A. Yes, sir.

Q. Equipped as those life boats were, would it be possible to lower one of them instantly?

A. No, sir.

Q. They had been tied up there for some time, hadn't they?

A. Well, we use that boat most every time in the Mendocino Dock at Fort Bragg to get the lines out with.

Q. How long a time would it have taken to have lowered the life boat, that is, to detach it and everything and lower it?

Mr. Monahan: Objected to as incompetent, irrelevant and immaterial.

The Commissioner: Objection overruled.

A. I should say a minute or two minutes, anyway. Maybe three. (Apostles, pp. 201-203.)

Q. By that time the other boats were up there?

A. That depends on where your men is at the time you want to lower them.

Q. Of course, the men have to get up there?

A. Yes, from their work.

Q. In that period of time the other boats had drawn up?

A. Yes. (Apostles, p. 202.)

By the Commissioner: What did they do towards lowering the boat?

A. Took the lines loose that was holding her on the inboard side and where the lines were wrapped around the davits, got them loose and everything ready to hoist her up and throw her over.

Q. But they didn't hoist her up?

A. No, sir.

Q. They didn't throw her out beyond the lines?

A. No, sir.

Q. They didn't raise her up at all?

A. I don't think they did. I wouldn't say as to that, but they didn't move her out if they did.

Q. How many men did you have working on the life boat at the time? Did you have all the men that were necessary to lower it?

Q. By the Commissioner: Then when they saw there were three boats attempting to save the man, then the crew of the "Brunswick" did nothing further —and they stopped?

A. Stopped and waited, yes, sir. (Apostles, pp. 206-207.)

A. These other boats you saw come in rushing up there were manned by——

A. ——Gasoline.

Mr. Monahan: Not all.

Q. Two of them were.

A. Commonly called motor boats or gasoline boats.

Q. And this man had sunk for the last time before they finished their work they had started at lowering the life boats?

A. Yes, sir; just about that time. When the man reached for him it was no use, because the boat was there. (Apostles, p. 208.)

Testimony of John E. Wahlgren:

A. I know they were there to try to get the boat over. I know one man was there and the second mate. I see them. But who else was there at the time I can't state particularly. I know there were some more men there. (Apostles, p. 215.)

Testimony of K. Lind:

Q. You were working at the life boat, were you, there?

A. Yes, sir.

Q. Getting it ready to swing it overboard?

A. Yes, getting it ready, getting the covers off, loosening up the covers.

Q. What did you do to get that ready?

A. I had to clear the halyards, the halyards are generally inside the boat and the cover on the life

boat—see? And then we had to get, there is a fore and aft strong-back to keep the cover in position. And I was working at that and the motor boats started to pull over towards the man so the boat would be there before we got our boat over. (Apostles, pp. 218-219.)

THE BRUNSWICK WAS EQUIPPED WITH LIFE BUOYS AND LIFE BOATS, AND ONE OF THE CREW IMMEDIATELY THREW A LIFE BUOY TO THE DROWNING MAN.

Testimony of John E. Wahlgren:

Q. Did you have any life buoys aboard?

A. Yes, sir.

Q. How were they rigged? What kind of life buoys did you have?

A. Regulation life buoys. (Apostles, pp. 83-84.)

Q. How are they attached? Where were they attached to the side of the vessel?

A. They are stuck in a canvas bracket, stuck right in a position so the man, all he can do is grab hold of the life buoy, pull it and throw it overboard. (Apostles, p. 84.)

Q. Now, Captain, how many of these buoys did your vessel have on it on this date?

A. Life buoys?

Q. Yes.

A. We had four.

Q. Four of them. And how many life boats such as you have described? (Apostles, p. 89.)

Testimony of C. Gibson:

A. Yes. I jumped on the house where the life boats were and four life buoys on the stern of the ship——

Q. On the deckhouse?

A. Yes, right hanging over the stern of the ship——

Q. Hanging over the top rail?

A. In a rack?

Q. Rack?

A. Canvas——Call them "suspenders" same as you put suspenders on. They were stuck in that.

Q. You mean a strap?

A. Strap, yes. And I got up there and one longshoreman says, "It's a time to take this life preserver out," but instead of lifting it out, he was pulling it this way, against the rail, and he couldn't get it out that way so I just got hold of this life preserver and threw it overboard. (Apostles, p. 101.)

Testimony of K. Lind:

Q. What life boat did you decide upon launching?

A. The port life boat.

Q. Did you have a life boat on the starboard side?

A. Yes, sir. (Apostles, p. 113.)

Q. What kind of life boats did the Brunswick carry?

A. Two wooden life boats.

Q. Can you describe those life boats?

A. Well, they are 20 feet long and about, I don't know, about 6——

Q. Twenty feet long. Can you give any further description of those life boats?

A. Yes. Four or 5-foot beam on them.

Q. Beyond the dimensions, can you give any further description of them so that if I went down I would know what class of boat to look for?

A. The customary equipment, all equipment with air tanks.

Q. Did you have a compass on the lifeboat?

A. Yes. (Apostles, p. 118.)

Q. I believe you say you saw one of the life preservers on the deck, did you?

A. On the deck when I stepped out, when I came aft.

Q. That life preserver was out of its sling, was it?

A. Yes. (Apostles, pp. 121-122.)

Q. It wasn't in this sling or suspenders?

A. No.

Q. Was it laying on the deck?

A. Yes.

Q. What was its condition with regard to being wet or dry?

A. It was wet. (Apostles, p. 122.)

Testimony of A. Nagel:

Q. Did you see the man in the pilot boat throw the life preserver?

A. Yes. (Apostles, p. 156.)

Testimony of Wm. O. Brown:

Q. Did you see any one throw a life buoy from the Brunswick?

A. Yes. Charlie, a sailor, came by and a man was trying to get one out and Charlie came up and pulled it out and throwed it overboard.

Q. What is that? (Apostles, p. 198.)

Q. How many life buoys were there on the boat?

A. Four astern.

Q. How many life boats?

A. Two. (Apostles, p. 200.)

THE CREW WAS THOROUGHLY EXPERIENCED AND EFFICIENT.

Testimony of John E. Wahlgren:

I am finished with the witness. You can have him. Excuse me a minute. Captain, how long have you been at sea?

A. About 32 years.

Q. And on what class of vessels have you served previous to going on the Brunswick?

A. Different classes of vessels, sailing and steam.

Q. Sailing vessels, too?

A. Yes.

Q. What sailing vessels?

A. Square rigged, fore and aft rigged vessels and steamers of different types and sizes.

Q. How long ago since you served on square-rigged vessels?

A. I came out to San Francisco in a barkentine in 1898, the last square-rigged vessel I been in. (Apostles, p. 86.)

Q. What do you understand about navigation, Captain? Are you a practical navigator?

A. I passed an examination to that effect.

Q. I am glad you told me that. When did you pass this examination for master?

A. About 12 years ago.

Q. For what class of vessel have you got a master's certificate?

A. I got a master's certificate for a steamer on any ocean, an unlimited master's license. (Apostles, p. 89.)

Q. Now, Captain, you have followed the sea continuously for how long did you say?

A. Thirty-two years.

Q. About 32 years. Now, with reference to the sailors that were on the Brunswick at this time, were they experienced sailors, if you know?

A. Yes, sir.

Q. Had you ever found any one of them to be incompetent?

A. No, sir.

Q. They had always performed their duties properly?

A. Yes, sir.

Q. You were familiar with your men, were you?

A. Yes, sir. (Apostles, pp. 93-94.)

Testimony of C. Gibson:

Q. How long have you been going to sea?

A. I have been going to sea since I was 13 years old.

Q. On what classes of vessels have you been going to sea on?

A. Steamers and sailing vessels, square riggers.

Q. Square-rigged vessels?

A. Yes.

Q. How old are you?

A. Forty-two years old.

Q. And you have been going to sea since you were 13 on square-rigged vessels and on steamers?

A. Yes. (Apostles, p. 102.)

Testimony of K. Lind:

Q. How long have you been going to sea?

A. Twenty-five years.

Q. On what class of vessels?

A. Sailing and steam. (Apostles, p. 115.)

Testimony of A. Nagel:

Q. In the capacity of winch man?

A. I have been going to sea since 1902.

A. No. I was A. B. (Apostles, p. 147.)

THE GRAVAMEN OF THE ACTION IN THIS CASE IS THAT THE BRUNSWICK WAS NOT EQUIPPED WITH LIFE BUOYS, LIFE LINES OR LIFE BOATS, AS REQUIRED BY LAW. AS A MATTER OF FACT, AT THE TRIAL OF THE CASE, PROCTOR FOR LIBELANT STIPULATED THAT THE BOAT WAS EQUIPPED WITH RAILS, LINES, LIFE BOATS AND LIFE BUOYS AS REQUIRED BY LAW.

Mr. Crider: As I understand it, Mr. Monahan is willing to stipulate that the United States Inspectors made an inspection of this boat before the accident happened—it has been testified that that was in December, before this accident happened—and at that

time the boat Brunswick was equipped with all necessary appliances, life buoys, life boats, guards, rails, lines, and so forth, as required by law and by the regulations in the Statutes of the United States. I understand you are willing to stipulate to that, Mr. Monahan?

Mr. Monahan: Yes, I am willing to stipulate that at the last time she was inspected by the local inspectors, if she wasn't fully equipped, they would, in the performance of their duties, compel her to be so equipped; and we will assume that she was fully equipped at that time.

Mr. Crider: Then your stipulation means that at that time she was equipped as required by law?

Mr. Monahan: Yes, at the last inspection, whatever time that was. Well, I didn't say life rails. The local inspectors haven't anything to do with those. You can build a ship in any manner that you like.

Mr. Crider: All right, then. Your stipulation covers life buoys, life boats——

Mr. Monahan: And other equipment required by statute.

Mr. Crider: Referring to the time immediately after the accident, a day or so after the accident, an inquiry was held, and that it was so equipped at that time.

Mr. Monahan: No. On mature deliberation, I cannot stipulate to that for this reason; the local inspectors have no authority to do anything beyond or are you speaking about the equipment of the vessel at that time?

Mr. Crider: Yes.

Mr. Monahan: Yes. I will stipulate also the local inspectors found her fully equipped at some kind of an inspection they had after the subject-matter of this libel arose.

The Commissioner: Can you fix a date at which that inspection was made?

Mr. Monahan: Sometime shortly after April 18 last.

Mr. Crider: Within a day or so after, Mr. Monahan?

Mr. Monahan: Yes. That she was fully equipped?

Mr. Crider: Yes, I would also like to offer the findings of the United States local inspectors, that is, the findings giving the result of their investigation of this accident, which I have here.

Mr. Monahan: I object to that on the ground the local inspectors have no judicial authority to inquire into anything beyond the equipment of the ship as provided for by statute, and that, it having been conceded the vessel was fully equipped, the subject-matter of their inquiry is entirely irrelevant and immaterial, and has no bearing on the issues here.

The Commissioner: I will sustain the objection as not being the best evidence. However, it may go into the record for the purpose of preserving the record on review.

Mr. Crider: Your Honor, may I ask that the Reporter copy this, and let the gentleman have it back?

The Commissioner: It may be copied in the record.

Mr. Crider: Mr. Reporter, will you copy this, please?

(The following is the matter so requested to be copied:)

TRIPLICATE.

File No. 981 S. I. G. No.

Report of Casualties and Violation of Steamboat Laws.

Name of Vessel, Brunswick-Freight steamer.
Name of Officer, John E. Wahlgren, Master.
Local District, Los Angeles, Cal.
Date of Report, May 8, 1922.
Date of Casualty or Violation, April 18, 1922.
Nature of Casualty or Violation, Accidental Drowning.
Action Taken, Case investigated and dismissed.
Number of lives lost, One.
Form 924-A.
Department of Commerce.
Steamboat-Inspection Service. 11-45-77

REMARKS.

While vessel was proceeding from dock at San Pedro to dock at East San Pedro about 8:05 a. m., John Hoeffner, an American, 38 years of age, married, who boarded the vessel to work as a longshoreman, accidentally fell overboard while engaged in pulling a sling around a load of lumber being prepared for discharging upon arrival at dock. Vessel was immediately stopped and crew made ready to launch life boat, but was not considered necessary as two launches and a skiff, being in the vicinity, went to his assistance. A life buoy was thrown to him from

one of the launches, which he did not grasp, and being unable to swim, he disappeared before assistance could be given further.

The body was found some eight days later, and coroner's jury brought in a verdict of accidental drowning. Case was investigated on April 20 and May 6, 1922, on which latter date testimony was taken from those connected with the vessel which just arrived in port.

No blame was attached to any of the licensed officers of the vessel for the mishap, and the case was, therefore, dismissed.

(Signed) S. A. KENNEDY, JR.
CARL LEHNERS.
United States Local Inspectors.

(Apostles, pp. 225, 226, 227, 228.)

ARGUMENT.

Only one conclusion can be reached from the evidence in this case and that is that there was absolutely no evidence of negligence whatsoever on the part of the owner of the vessel or its agents.

According to the testimony of certain witnesses the very same pile of lumber that the deceased fell from was piled there by the deceased himself with the assistance of another employee. It will be noted that the deceased had previously been working with another man, who, when the boat left the dock, ceased working with the deceased and proceeded to handle the lines of the boat. The deceased then took on another partner. This partner whom the deceased subsequently worked with stated that they did not pile the

load of lumber off of which the deceased fell. This testimony is satisfactorily explained by the fact that the deceased had been working with another employee and did not commence to work with the witness until after the lumber had been piled. The fact, however, cannot be disputed that the duties of the deceased employee were to assist in the loading and unloading of the vessel. The steamship Brunswick was engaged in unloading certain lumber at certain docks in the channel of the harbor at San Pedro. There was no one on the steamship who would be in a better position to know the condition of the pile of lumber than the deceased himself. Finding difficulty in getting a sling under the load he, either of his own volition or on the suggestion of his partner, who was a fellow-servant, went up on the pile of lumber. The libel alleges that the deceased "tripped". One of the witnesses stated that the piece of lumber on which the deceased was standing with his back to the water was unsteady. A few seconds before the fatal fall into the water the piece of lumber on which the deceased was steadying himself tipped with him. This time, however, he did not fall. The next time the piece tipped or slipped he lost his balance and fell over backwards into the water. It is difficult to conceive how the appellant can seriously contend that there is any negligence whatsoever upon the owners of the vessel in causing the fall of the deceased.

The vessel in this case was used for the transporting of lumber. It is a matter of common knowledge that lumber when being carried on a vessel is always stacked up on the deck even with the edge of the boat at a

height of ten or twelve feet. These stacks are then lashed to the deck of the boat. The statement of Proctor for the Libelant that there should have been a life line or other protection around the top of the pile of lumber to prevent the deceased from falling is absurd. Mr. Monahan as a seafaring man himself knows that such a thing would be highly impracticable and next to impossible. It has never been done in the past and will not be done in the future. It must furthermore be taken into consideration that at the port where the deceased was working the lumber was being unloaded at certain docks. As a matter of fact, the deceased at the time of his death was engaged in preparing a sling load of lumber so that the load could be lifted from the boat to the dock. As Judge Bledsoe mentioned in his opinion, it would be impossible to have any sort of line or guard on top of the load of lumber where the load is constantly changing in height. In this particular case the load became lower as every sling load was removed from the pile of lumber. It was simply one of those unfortunate cases where a man through his own fault loses his balance and falls off of a place where he is working. It is a clear case where the doctrine of assumption of risk would apply.

THE VESSEL, ITS OFFICERS AND CREW, DID EVERYTHING POSSIBLE TO SAVE THE DECEASED FROM DROWNING.

Acording to the testimony of Gibson, the winchman, as soon as the deceased fell overboard he yelled, "Man overboard!"; he then proceeded to the rear end

of the boat at the same time yelling to the captain and to other persons that a man was overboard. The deceased's partner testified that he attempted to unfasten the life preserver from the stern of the boat but was unsuccessful. He testified that at the time he reached the rear end of the boat and was attempting to unloosen the life line the boat was about three hundred feet from the man who had fallen overboard. The appellant lays great stress on the fact this life preserver could not be released and that no one threw this life preserver to the drowning man. The attempt was made to prove this fact by the testimony of the deceased's partner who himself testified that the man was three hundred feet away from the boat at the time he attempted to unfasten the life preserver from the boat. It stands to reason that it was useless to attempt to throw a life preserver to a man who was this distance from the boat. It is a matter of common knowledge that these life preservers are heavy and bulky. It is impossible to throw them for more than twenty-five or thirty feet. This fact was also laid stress upon by Judge Bledsoe in his opinion. We find, on the other hand, that according to the testimony of the witness Gibson, he (Gibson), when he found that the deceased's partner was unsuccessful in unloosing the life preserver, merely went over to the life preserver, lifted it off of its hook and threw it into the water. The engineer on the boat also testified that he saw this man throw the life preserver into the water. The boat having been in motion at the time the deceased fell overboard, it stands to reason that the life preserver served no useful purpose. The life

preserver, according to the evidence in the case, was hung on a hook. The partner of the deceased in his excitement endeavored to release the life preserver by pulling it straight out rather than lifting it up slightly and then pulling it off of the hook. As we have previously stated, however, the fact that the deceased's partner had difficulty in releasing the life preserver had nothing whatsoever to do with the drowning of Hoeffner.

Appellant lays great stress on the fact that the vessel was not reversed or backed in sufficient time to save the deceased. It must be taken into consideration that the Brunswick was a heavy steamship loaded with lumber. The Brunswick was one hundred and sixty-two feet long and thirty-five feet wide. When the boat was loaded it drew sixteen feet six inches aft and foureten feet nine inches to fifteen feet forward. Mr. Monahan, the proctor for appellant, as a man experienced in navigation, himself knows that it is physically impossible to immediately reverse a boat of such dimensions with a displacement of approximately five hundred and thirty-two tons. It must be taken into consideration that during the few minutes' time that the witness to the accident was running to other parts of the boat to notify the captain that the man had fallen overboard the vessel was proceeding forward. A certain amount of time was necessarily lost while the captain was signalling the engineer of the boat to stop the engines and reverse the same. After the engineer received the signal it required a second or so for him to stop the engine. It required another second or so for him to reverse the same. During all of this time the boat was traveling away

from the man who had fallen overboard. According to the testimony in this case the boat traveled forward even after the engine had been reversed. Any one who has had any experience whatsoever in navigation knows that it is impossible to reverse the direction of a vessel before it has traveled several hundred feet. The captain of the vessel further testified that there was a boat overtaking him and that to have immediately reversed the engines without changing the direction to the boat would have resulted in the Brunswick in all probability colliding with a certain pipe line and with the overtaking vessel thereby endangering the lives of numerous persons. Counsel for appellant makes a very weak attempt to show that the master of the vessel exercised poor judgment and did not carry out the rules of the road. As Judge Bledsoe stated in his opinion, what might be the rules of the road in the open sea and in ordinary waters would not necessarily be the rules of the road in an emergency such as this. It is well-established law that to adhere closely to the letter of the law in some instances would be to violate the law. It is impossible for rules to be promulgated which will take care of all emergencies. The overtaking vessel was but a few hundred feet from the Brunswick at the time the deceased fell overboard. There can be no denying the fact that the master of the vessel exercised the very best judgment under the circumstances.

Appellant further invokes reference to the fact that the officers and the crew made no offer to lower the life boat. As Judge Bledsoe stated in his opinion, two small gasoline launches and skiff immediately went to the scene of the accident. These boats at the time

notice was given that the deceased was overboard were no further from the drowning man than was the steamship Brunswick. These boats were light craft and were in a position to reach the drowning man as soon as possible. Before it was physically possible to lower the life boat these three craft had reached the point of the drowning man and as a matter of fact arrived just as he sank. To have continued to lower the life boat with all of the other assistance at hand would have been useless. It is a known fact that it takes quite a number of minutes to lower any life boat from a vessel irrespective of what the particular nature of the apparatus may be. The life boat in this case, as in all cases, was nothing more nor less than a boat propelled by oars. Had the boat been lowered into the water it could not have reached the drowning man in any shorter time than it would take to row the boat over to where the man was. To require of the officers of the steamship Brunswick any greater degree of caution and alertness than was exercised in this emergency would be to demand the impossible.

THE VESSEL CONTAINED A COMPETENT CREW.

A feeble attempt was made in the taking of the testimony to prove that the vessel did not contain an experienced crew. This part is also raised in the case on appeal.

We need only to mention the fact that the master of the vessel was duly licensed to act as such; had passed the customary examination given by the duly constituted authorities and had thirty-two years of experience at sea. Mr. Lind, another member of the

crew, had followed this particular line of work for twenty-five years. One of the other witnesses who was a member of the crew testified that he had been a seafaring man for ten years. The fact cannot be seriously questioned that this vessel possessed a crew of men all of whom were experienced in their particular line of work.

THE VESSEL WAS SEAWORTHY AND PROPERLY EQUIPPED.

As far as the seaworthiness of the vessel is concerned, we need only mention the fact as commented upon by Judge Bledsoe in his opinion that both parties at the trial of the case stipulated that the United States Inspectors had inspected the vessel in December prior to the accident and that at that time the vessel was found seaworthy and properly equipped. It was also stipulated to that one or two days after the accident happened the local United States Inspectors found the vessel to be fully equipped. As stated by Mr. Monahan, counsel for appellant, at the time of taking testimony before the United States Commissioner, he was willing to stipulate and stated that he assumed that at the time the local inspectors inspected the boat she was fully equipped. This inspection was made shortly after the accident happened. According to the report of the United States local inspectors (which document was admitted in evidence under the objection of appellant) no blame was attached to any of the licensed officers of the vessel for the mishap, and the case was, therefore, dismissed. As Judge Bledsoe mentioned in his opinion the

question of the equipment of the vessel had nothing whatsoever to do with this accident. Had the boat been equipped with all the life savers and life boats in and about San Pedro harbor it would not have prevented the drowning of Hoeffner. Assistance reached the drowning man before life boats could possibly have been launched and the drowning man having fallen overboard while the boat was in motion life preservers were useless. At any rate the boat was fully equipped and complied with the law in this respect.

Under the facts of this case the only conclusion that can be reached is that the deceased caused his death through his own negligence.

Hoeffner was directly engaged in handling the very same load of lumber that he lost his balance and fell off of. The appellant says he tripped. The evidence shows that he lost his balance and fell off. There is no evidence that the boat was lurching at the time the accident occurred. It is a well-recognized fact that the waters of the channel at San Pedro are smooth and that there is very little activity in that port. Even though the boat had lurched just prior to the deceased losing his balance it would be one of the hazards which he naturally assumed in undertaking said employment.

An employee on and about a vessel must necessarily assume certain hazards incidental to said work. An employee may lose his balance and fall down an open hatch, but this would obviously not be a case of negligence on the part of the vessel, as held in the case of The Kongosan Maru, 292 Fed. 801, and numerous other cases. It is merely one of the hazards inci-

dental to the employment which the employee assumes when he accepts such employment.

JUDGE BLEDSOE, BEFORE WHOM THIS CASE WAS PENDING IN THE LOWER COURT, DID HAVE AUTHORITY TO DECLINE TO ACCEPT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES COMMISSIONER.

The Appellant alleges that the district court erred in overruling the findings of the Commissioner. The one case which on first flush would appear to be in point would be the case of *Luckenback* vs. *Delaware, L. & W. R. Co.,* 168 Fed. 560. This was a decision of Judge Adams, District Judge of the Second District, decided March 25, 1909.

By reference to the very short opinion in this case you will note that there was absolutely no authority whatever cited for this holding. In the case of The Boquitlam City, decided by Judge Neterer of the District Court, W. D. Washington, N. D., May 4, 1919, 243 Fed. 768, the Court said, in commenting upon the case of *Luckenback* vs. *Delaware, L. & W. R. Company,* 158 Fed. 560:

> "I think the Court should consider the exceptions filed to the report of the Commissioner. The objections to the consideration thereof for the reason that they were not filed within the time provided by Admiralty Rule No. 45, I think, should not obtain. Nor do I think that the Court is bound by the findings and Conclusions of the Commissioner under the order of reference made, as such findings were merely advisory, and the Court may disregard them entirely, for the claimant had entered an appearance and contests the claim asserted. *Luckenbach* vs. *Delaware, L. &*

W. R. Co. (D. C.) 168 Fed. 560, I do not think is controlling here."

The last word on this subject is the case of *The Spica-Morse Drydock and Repair Company* vs. *Susquehana Steamship Company.* (C. C. A.) Second Circuit, March 14, 1923, 289 Fed. 436.

In this case the court said:

"Doubtless, although not specifically so authorized by rule or statute, an admiralty court may send to a commissioner or the like the ascertainment of any special set of facts; but the report is merely advisory, the power of final decision being in the tribunal to which the report is made. (The City of Washington, 92 U. S. 31.) But no party has a right to a reference; the Court is empowered to try each and every part of every case, if so minded, *United etc. Co.* vs. *Compagnie Generale* (C. C. A.) 271 Fed. 184. And since equity and admiralty derive their respective method from a common source, it is as true in admiralty as in equity that it is not competent for the court to refer the entire decision in a case to a master or commissioner without the consent of the parties. It cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment a controversy presented.

"The Commissioner in this case could only have proceeded to try the whole case *by consent;* hence our inference, we being loath to infer illegality. Result is that the decree appealed from rests upon a Commissioner's report, which, to be sure, allows a certain sum as damages, but is much more concerned in declaring why any damages are allowed, and why appellant should pay them; matters properly for Court's adjudication before assessment directed."

Counsel for Appellant has no doubt overlooked the fact that the following procedure, or rather discussion, took place between the Commission and Mr. Monahan on December 3rd, 1922, at the time the matter came before the United States Commissioner for the taking of testimony.

This discussion, which is part of the record and which immediately preceded the examination of witnesses, was as follows:

> The Commissioner: "Is the usual stipulation entered into?"
>
> Mr. Monahan: "Yes. We enter into the usual stipulation for Commissioner's fee and and stenographer's fee. *And, further, we would like to stipulate that either proctor may save exceptions to any action of the court without specifically mentioning it.*"
>
> The Commissioner: *"I hardly think a stipulation is necessary because the report of the Commission is subject to exceptions."*

Appellant's Proctor has further neglected to take into consideration the fact that no motion was made to dismiss the exceptions at the time they were filed to the Commissioner's report. In the Luckenback case, which Proctor cites, this was done. As a matter of fact the appellant tried the case de novo before Judge Bledsoe of the United States District Court. Having made no objection whatsoever to the matter being tried before Judge Bledsoe and having filed no motion to dismiss the exceptions to the findings of the Commissioner the Appellant cannot for the first time on appeal raise such an objection. Having tried the

case on the theory that the Commissioner had jurisdiction he cannot now change his theory and contend in the Appellate Court that the District Court did not have the authority to review the findings of fact and conclusions of law of the Commissioner.

Although there is no doubt but what the District Court had the right to decline to accept any of the findings or conclusions of the Commissioner, it must be noted in this case that the court reversed the findings of the Commissioner on the ground that the evidence in the case was insufficient to support the findings of fact and conclusions of law of the Commissioner to whom the matter was referred. As before stated Judge Bledsoe in his opinion does not attempt to weigh the evidence or draw any conclusions of fact from disputed testimony. In arriving at his decision in this case he assumes the truth of whatever testimony there may be unfavorable to the case of the Appellee.

THE QUESTION WHETHER OR NOT DECEASED WAS PROVIDED WITH A SAFE PLACE TO WORK IS NOT A PROPER ISSUE IN THIS CASE.

In the recent case of *Cassil* vs. *U. S. Emergency Fleet Corp. et al.* (C. C. A.) 9th Circuit, 289 Fed. 774. Decided May 7th, 1923, this court held in a case where a stevedore was injured while engaged in rendering a maritime service in loading a ship that:

> "he could hold the Emergency Fleet Corporation responsible for damages only on the theory that the vessel was unseaworthy in respect to the instrument whereby his injuries were occasioned."

In the case of *Burton* vs. *Greig,* 271 Fed. 271, the court held that liability could be imposed only upon the failure of the owner of the vessel to maintain the same in a sound and seaworthy condition.

There can be no denying the fact that the steamship "Brunswick" was seaworthy at the time Hoeffner lost his balance and fell therefrom. The boat was properly equipped, according to the stipulation of counsel in the case and the testimony taken before the Commissioner.

Even though this Court might agree with the Commissioner that there was negligence on the part of the officers of the steamship 'Brunswick", a recovery could not be had unless the "Brunswick" were proved to be unseaworthy and improperly equipped.

In other words, the owner of the vessel is not liable for a negligent or improper order of the master of the vessel or for the failure of the master to use equipment in a proper manner.

CONCLUSION.

In conclusion appellee reiterates that the evidence in this case conclusively proves that the deceased, John H. Hoeffner, came by his death not by any failure upon the part of the owner of the vessel or its agents to exercise proper or ordinary care, but that the deceased met his death through his own carelessness in stepping on a piece of timber which had previously slipped while he was standing on the same, whereby he lost his balance and fell backwards into the waters of the channel of San Pedro harbor.

Wherefore, we respectfully submit that the judgment and decree of the District Court of the United States for the Southern District of California, Southern Division, be affirmed.

HETTMAN & HOGE,
JOE CRIDER, JR.,
Proctors for Appellee.

J. HAMPTON HOGE,
Of Counsel.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Christina M. Hoeffner, as Administratrix of the Estate of John H. Hoeffner, Deceased,
Appellant,
vs.
National Steamship Company,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

JOHN J. MONAHAN,
Proctor for Appellant and Petitioner.

Parker, Stone & Baird Co., Law Printers, 232 New High St., Los Angeles.

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Appellant,

vs.

National Steamship Company,

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APPELLANT'S PETITION FOR A REHEARING.

Appellant respectfully and most earnestly asks for a rehearing of this cause, and requests that she be permitted to point out by facts judicially noticed and by the testimony in Apostles, the merits of her petition, as disclosed by the following points.

Point I.

The Place Where Deceased Was Required to Work Was Inherently Dangerous.

In Brown v. Piper, 91 U. S. 37, the Supreme Court held:

> "The courts of the United States take judicial notice of the ports and waters of the United States where the tide ebbs and flows" * * *

> "Courts also take notice of whatever is generally known within the limit of their jurisdiction * * * This extends to such matters of science as are involved in the cases brought before him."

It will be noted that in this case without proof or allegations in the pleadings the Supreme Court judicially took notice of a matter of science.

Appellee's schooner Brunswick is a very small, stumpy vessel of 162 feet in length, 34 feet beam, and 532 gross tonnage. [Apostles, p. 75.] She arrived at San Pedro Company dock at San Pedro at 7:00 A. M. April 18, 1922, and there discharged only tan bark for J. C. Hendry [Apostles, p. 74], which the sailors unloaded. [Apostles, p. 166.]

On this occasion the Brunswick had a deck load of lumber which she brought from the north, and it is universally well known among sailormen that such a small vessel with a deck load in the month of April pitches and rolls considerably at sea. This deck load, according to the testimony of Gallagher who actually worked thereon, was in prepared loads of heavy planks [Apostles, p. 167], and this, no doubt, for the purpose of facilitating and expediting the unloading thereof. Upon the removal of the lashings it is obviously manifest that the top of this lumber pile was a disordered mass, and so found by the Commissioner.

The deceased was a man of mature judgment, of splendid physique, and settled habits, and only a few months prior to his death was head of the packing department in Southwestern shipyards. [Apostles, p.

164.] Attributes implying care and prudence on his part.

The slipping of the deceased immediately upon getting to his working position on this pile of lumber, as testified by Nagel [Apostles, p. 145], and by Gallagher [Apostles, p. 167], under the circumstances, would, it seems, conclusively establish the dangerous condition of this working place.

Further, the month of April is not a fine weather period, even in San Pedro. The Inner Harbor, where deceased was drowned, is very narrow, and there is always considerable traffic there. Vessels must pass close to each other, and the wash caused by propellors creates considerable disturbance. Every vessel moving there rolls perceptibly, but a small vessel like the Brunswick, with a deck load, would roll considerably while under way there. Hence in ordering the deceased to go on top of this unprotected lumber pile under these conditions, would, it appears, be a specific act of gross and indefensible negligence. It would be but a simple matter to stretch a few lines outboard of this lumber pile. It would only take a few minutes to put them up and remove them as the load was lowered. It would be simpler still, and more in accordance with maritime practice, to wait until the arrival of the vessel at the dock in the east side of the channel and securing her there, before sending men untrained and unaccustomed to sea and rolling of vessels on top of lumber pile. It would only have taken a few minutes to get to the east side and secure the vessel to the

dock, and no unloading could have been done prior thereto.

Even if it be conceded that the top of this lumber pile was not a disordered mass, the deceased had to begin at the extreme outboard edge of this lumber, and no man, not even an experienced seaman, could work there and maintain his poise on top of a lumber pile 9 feet above the deck, and considerably higher above the water, on board of a vessel under way and rolling.

In Chesapeake & Ohio Railroad Company v. Proffit, 241, U. S. 462-468, the Supreme Court in unanimous opinion, held:

> "To subject an employee, without warning, to unusual dangers, not normally incident to the employment, is itself an act of negligence."

Point II.

Stopping of the Vessel.

The following testimony shows that the Brunswick did not stop until just after or about the time deceased sank. Gallagher, who was at stern of ship [Apostles, pp. 170, 171], Durante [Apostles, p. 183], Johannesen [Apostles, p. 188], Hack, who was standing at end of dock [Apostles, p. 193], and the stipulated testimony of two other witnesses [Apostles, p. 192]. Further, the actual distance traveled by the Brunswick, before she stopped, *i. e.*, when she got to end of Kerckhoff dock, a distance of 800 feet from deceased, leaves no doubt as to this.

This was the exact point the Brunswick would have to stop to make a sharp turn around the dolphin to which the dredge with pipe line was moored.

However, the master of the vessel expressly disclaimed any intent to stop his vessel to rescue deceased, as the following testimony discloses:

Master. A. "I had to stop her and go ahead to not back into the dock, and in other words, I could not lay there, and have this between—in case this boat (vessel) coming up the channel. I had to let him go. I couldn't blockade the channel in any shape or form." [Apostles, pp. 213, 214.]

A. The first thing I done, I starboard the helm a little bit so the vessel would swing over so I could back the vessel because if I hadn't done so I would run her into a pipe line so I would have damaged the pipe line, anl also a big steamer proceeding out at the time, I would have blocked the channel and it would be a case of collision. So the minute I seen I could back the vessel enough to stop headway on her I done so.

Q. Did you not testify this morning that there was a large steamer coming up astern?

A. Exactly.

Q. And that was the reason you continued on, instead of backing down to him—you didn't—

A. I backed the vessel to get away from the channel, so as to let the steamer go by me.

Q. To give the steamer room to pass?

A. Yes, and in doing so I had to back the vessel up. [Apostles, pp. 216, 217.]

Now, the Brunswick had only left the San Pedro Company dock, with full head of steam in boilers, and

going only two or three miles an hour, having a clearance to the dredge and pipe line of 1500 feet easterly, that vessel being 162 feet in length, heavily loaded, with an overtaking vessel 2000 feet on his starboard quarter. [Apostles, pp. 94, 95.] She was 532 gross tonnage and had 500 horsepower [Apostles, p. 75], almost a horse power per ton. If, when the cry of "Man overboard" was raised, the captain backed full speed, the momentum of the vessel would have been instantaneously arrested, and the forward powerful movement of the water caused by the propellor backing would have carried every floating object in the immediate vicinity with it, including the deceased in this case, and then if there were thrown overboard substantial pieces of wood, life preservers and life buoys, the life of the deceased could very easily have been saved. This is but an elementary principle of seamanship and well known by even the crudest of modern seamen.

According to the testimony of this witness he put his helm to starboard, so as to prevent his running into pipe line about 1500 feet easterly. This helm action naturally forced him into Kerckhoff dock on west side of channel, and then, after getting in there, he had to go ahead so as not to back into that dock. What a master mariner? This is the same master mariner who testified "he had lashings to hoist the boat up and swing the davits out." [Apostles, p. 79.]

Point III.

Boats in the Immediate Vicinity of Place Where Deceased Was Struggling in the Water.

It is apparent from a reference to the following excerpts of the opinions of the District Court, and this Court, that these opinions are predicated upon the fact that there were three power boats nearer and better qualified to rescue the deceased than was the Brunswick.

District Court: "If the deceased had fallen overboard in a large body of water, with no one in the vicinity save those on the 'Brunswick,' it could easily and very properly be claimed that a complete failure on their part to do anything in the way of endeavoring to rescue him would be chargeable as gross and indefensible negligence. However, under the conditions obtaining, with others nearer and better qualified to render assistance, the fact that the crew of the 'Brunswick' did not do more than they did is satisfactorily explained." [Apostles, p. 66.]

This Court: * * * "That the calls of those on board the vessel attracted the attention *of a nearby pilot boat* and two power boats, each of which speedily went to his rescue, * * * the pilot boat reaching him just as he was sinking for the last time, and so nearly rescued him as to touch the tips of his fingers and to get the cap from his head." [The Court's Opinion, page 7.]

Only three boats went to the rescue of deceased. One a heavy working rowboat, and two launches. [First Mate Lind. Apostles, p. 121; Seaman Nagel, Apostles, p. 153.]

Now, a reference to the Apostles, pages 187, 188 and 189, shows that Johannesen was working on a pipe line of the dredge, and when he heard the cry of "Man overboard" from the Brunswick, he was about 700 or 800 feet distant from the deceased, while the Brunswick was only 300 feet from him, and she was going ahead. He states that he "throwed his tools away, jumped in the skiff, untied the skiff and started alone in this heavy working skiff (rowboat) to pull over to the deceased, and got to where he was just as he sank. He was the first to hear the cry of "Man overboard," and the first to respond. Certainly no one could say that he was nearer to the deceased than was the Brunswick or had a better or speedier boat than would be expected from a properly equipped lifeboat manned by at least four competent seamen, and in charge of a certificated lifeboat man, which latter is required by R. S. Sec. 4488, Sec. 7454, Barnes Federal Code.

The next boat in point of time was Durante's launch. His testimony is as follows, and also explains his meeting with the pilot boat which was then going north:

A. I was coming up the bay from taking the crew ashore. I was coming north, coming up. The boys was working on the pipe line, about, I should judge, five or six pontoons away from the dolphin. The pipe line was busted or something and they were working and I went up to help them. When I got there they were pointing over that way towards the Pedro side and hollering at me but the engine, gas engine making so much noise, I couldn't understand what

they were saying, and I come out of the cabin of this launch and listened and I heard a fellow on the Brunswick hollering, "Go get that man." I looked over in the direction and saw the man struggling in the water. Then I didn't pay attention to anything else. I rushed over there and had to circle around at first by the stern of the—

Q. Brunswick

A. Yes, sir.

Q. Making a circle going to the rescue of this man?

A. Yes. I was going straight for him and I saw the pilot boat coming, I got out and pointed to him and he looked out and didn't know that the man was overboard. When he saw me coming he looked, and, of course, his boat was going fast and he tried to check the boat and he reached down—of course, I had to work to avoid a collision with him. That throwed me off my course. And just as the pilot boat was passing the man reached down, the man had his hand up in the air about that much out of the water.

Q. By the Commissioner: When you found out there was a man overboard, how far were you from the Brunswick

A. I should judge about 700 feet, six or seven hundred.

Q. Was the man in the water between you and the Brunswick In other words, were you further away from the man than the Brunswick was

A. I should judge we were about the same distance only I was east and the Brunswick was north.

Q. About the same distance from him?

A. About the same distance from him.

Q. Kind of triangular, was it?

A. Yes, sir. I was east and he was north from the man. [Apostles, pp. 180, 181, 186.]

Here, then, according to the testimony of the master of the vessel, and other witnesses of appellee, he was, at time deceased fell overboard, going about two or three miles per hour, and at that speed the vessel was stopped, backed full speed, and then went ahead, and arrived at position about 700 or 800 feet north of deceased at time Durante came up in his launch. Durante up to this time was not in the vicinity and knew nothing about a man being overboard, and he had to return the same distance to the deceased after describing a circle with his launch. He states that he was returning to the dredge from taking his crew ashore. (No doubt the shift going off at 8:00 A. M.) The only place in the Inner Harbor, San Pedro in that vicinity where launches could land is at Fifth street landing and that place is at least a mile distant from where the deceased was precipitated overboard. That landing could be seen from east side of channel but not from Kerckhoff dock or its immediate vicinity on account of indenture in the dock line. Assuming now that speed of Durante's launch is 15 miles per hour (and it is more), she would have traveled one mile in four minutes, and it can scarcely be doubted that the Brunswick would at least take considerably more than that time to travel 700 or 800 feet at a speed of 2 or 3 miles an hour and stopping and backing. So, it is absolutely safe to say that Durante was at least a mile south, and consequently out of sight, of the Brunswick at time deceased was precipitated overboard therefrom.

Referring now to the only other boat in the vicinity, the pilot boat, it will be noted that Durante was coming (going) north *i. e.,* same direction as Brunswick, that upon his arrival abreast of the Brunswick and when he saw the men pointing and heard their hollering which he could not understand, on account of the noise from his gas engine, came out from the cabin, and then seeing the man in the water he described a circle by the stern of the Brunswick and headed south to him. It was then that he discovered the pilot boat coming towards him or going north, and when they nearly met the pilot boat threw him (Durante) off his course. The pilot who just at that moment discovered that a man was overboard was unable to check the headway of his boat, which was going fast, in time to rescue the deceased, but with a sailorman's resourcefulness, he reached for him as he passed by, and then threw a life preserver to him, but the deceased sank at that time. It will thus be seen that the pilot boat was considerably more than a mile south of the Brunswick and out of her sight at time deceased was precipitated overboard, and that he had had only an instantaneous glance at him before he sank.

It will be noted that Gallagher ran aft to throw a life buoy to the deceased. Had there been one forward and not permanently secured, he could have thrown it almost simultaneously to the deceased, and being lighter than the deceased, the wash of the propellor with the vessel going ahead, would have carried it almost immediately to the deceased.

Johannesen dropped everything, got into his heavy boat, untied it and with all his might he tried to save his fellow man.

Durante stated: "Then I didn't pay attention to anything else. I rushed over there" * * *. The pilot, too, used his every best effort to effect a rescue. But the master, officers and crew of the Brunswick. What did they do? The answer is they did nothing but watch.

Point IV.

Life Saving Appliances.

Gallagher testified positively that the life buoy was tied to the ship's rail, and that he spent 4 to 6 minutes in untying that line, before Gibson rushed up to the life buoy. Gibson testified that he was down on the poop *in the stern of the ship* [Apostles, p. 107], and this means on the deck below and immediately under Gallagher, and naturally he could not very well see through the deck what Gallagher was doing. Gallagher again testified emphatically that Gibson did not throw a life buoy overboard. [Apostles, p. 176.]

That no life buoy, life preserver or piece of lumber was thrown overboard to the deceased from the Brunswick was, it seems, established by the testimony of Gallagher, *supra,* by Hack, who was standing at end of dock and watching the Brunswick [Apostles, p. 194]; by Durante and Johannesen [Apostles, p. 184]. It was the latter, and not the pilot, who took the hat of deceased. [Apostles, pp. 182, 190, 196.]

No doubt Gallagher had the line untied when Gibson rushed up to the life buoy, 4 to 6 minutes after Gallagher started to untie it.

Sec. 4488, R. S. as amended, Sec. 7454 Barnes Federal Code provides:

> "Fifth. All the life buoys and life jackets shall be so placed as to be readily accessible to the persons on board; their position shall be plainly indicated so as to be known to the persons concerned.
>
> "The life buoys shall always be capable of being rapidly cast loose, and shall not be permanently secured in any way * * *"

The practice which universally obtains on board all ships, American and foreign, is to carry the required number of life buoys in different parts of the ship's rail, and set into canvas straps, so that any person of ordinary eyesight could understand how to remove them. Obviously, therefore, if Gallagher, a man of ordinary intelligence, spent 4 to 6 minutes trying to get that life buoy overboard, but apparently did not know how, the conclusion is inevitably forced upon us that only seamen trained to the method of stowage could effectively use them, and there are many who are not seamen on board of every ship, such as passengers, cooks, firemen, etc.

The four life buoys on board the Brunswick were carried at the extreme stern of that ship, and they were not, therefore, *readily* accessible to the persons on board, especially those in the forward part of the ship, as in this case, when their use was urgently re-

quired; and if Gallagher did not know how to get one adrift in less than 4 to 6 minutes, they were not capable of being *rapidly* cast loose, and they were, according to his positive testimony, permanently secured.

In a case absolutely analogous to the case at bar, in that life preservers or life buoys were not readily accessible, to effect the rescue of a man who had accidently fallen overboard from a vessel, in Norfolk Southern R. Co. v. Foreman, 244 Fed. (C. C. A. 4th Cir.) 353, at page 360, it was held:

> "* * * It seems to this court that if an employer requires its employees to work in a place where they may be subjected to the danger and peril of being precipitated into the water, as in the present case, there should be provided devices and facilities reasonably fit and accessible to ward off a fatal eventuation by effecting a rescue if reasonably possible."

Again, in Carlisle Packing Company v. Sandanger, 259 U. S. 255, 66 Law, Ed. 927, at page 259 of 259 U. S., and page 930 of 66 L. Ed., the Supreme Court held:

> * * * "That, without regard to negligence, the vessel was unseaworthy when she left the dock if the can marked 'Coal oil' contained gasoline; also that she was unseaworthy if no life preservers were then on board; and that, if thus unseaworthy, and one of the crew received damages as the direct result thereof, he was entitled to recover compensatory damages. Citing cases * * *."

Further, in Pacific American Fisheries v. Hoeff, 291 Fed. 306, in which case the only defect shown was the negligent failure to fasten a ladder at the top. The ladder falling as the libellant stepped on it. This court affirmed a decision holding the vessel owners liable.

It is absolutely inconceivable that, if life boats and other life saving appliances were readily accessible; and if the master, first mate and crew had been properly drilled and efficiently exercised in the handling of life boats and other life saving appliances, and a deck crew adequate in number and properly trained, as required by the mandatory provisions of statutory law, hereinafter set forth, a man falling overboard could be allowed to drown. As heretofore stated, the ship just left one dock to go across the Inner Harbor, San Pedro to another dock, which necessitated all deck force being on deck; the ship going only two or three miles an hour, about one-half the speed of an ordinary walk; unlashed lumber cargo on board, as well as other available pieces of wood, such as chest covers, oars, etc.

In addition to the condition and unavailability of the life buoys, heretofore pointed out, a reference to the Apostles will conclusively show by the testimony of appellee's witnesses, the following:

The deceased fell overboard on the starboard side, the port boat was the best to get over (launched). [Apostles, p. 206.] The port boat had a hawser coiled in it (the smallest being 5" in circumference, and 120

fathoms (720 feet) long. The boat falls of this boat were not hooked on to the boat davits and to the boat, the first mate testifying he had to clear the halyards, the halyards are generally inside the boat. [Apostles, p. 219.] (He means the boat falls.) This boat was in the boat skids, and secured there with boat cover on [Apostles, p. 220], which is laced over stem and stern, and tied by stops (small ropes) four inches apart under the keel, to keep wind from getting under or into boat cover and tearing it apart.

Point V.

Inadequacy of Deck Crew, and the Culpable Incompetency of This Inadequate Crew, as Determined By Their Inaction and Incompetency Otherwise Proved, Which Demonstrate the Complete Failure to Carry Out Muster and Boat Drills, Required By Sec. 4488 R. S., Sec. 7454 Barnes Federal Code, Page 1783.

There were but four seamen on board [Apostles, p. 141], (although other times the ship carried 8 or 9 seamen). [Apostles, p. 144.] Seaman Nagel was on the forecastle when deceased fell overboard. He did not go aft to get a life buoy or to man the boat, but remained on forecastle watching. [Apostles, p. 148.] He had but one eye. [Apostles, p. 146.] "He had been working three years in logging camps. That has been lately." [Apostles, p. 155.]

Seaman Gibson testified: A. No, I never heard the cry of "Man overboard", because I was down on

the poop in the stern of the ship. We were getting the lines ready for when we go to Blinn's to make the ship fast. I heard these fellows running forward along the (deck) house and I heard them and I looked out to see what was going on *and I seen them all excited and looking outside,* and I looked and see a man floating by and I knew a man was overboard. [Apostles, p. 107.] This seaman was never examined for able seaman. [Apostles, p. 103.] He did not go to the life boat. [Apostles, p. 105.] His failure to answer elementary questions showed that he was even as crude a seaman as the captain and first mate. No doubt he, too, was recruited from the logging camp.

Now, there only remain two more seamen not accounted for, and these two with the first mate could not launch and man a life boat.

First Mate Lind. A. When I heard the man holler I was turning my back to them and I heard a man on the forecastle holler "Man overboard". Then I went aft and I hollered to the captain. He was standing on the port side.

Q. The port side of the bridge?

A. The port side of the bridge. I said, "there's a man overboard" and I walked aft around on the port side to go after the life boat—

Q. On the port side?

A. Yes. I walked around to see the captain and then walked aft. I saw the man by that time, the man was pretty well astern and there was two boats there launched and the boat alongside the pipe line over there, and there was somebody was hollering to him about 100 feet or probably more from the man at that time to go and get him. They didn't seem to understand it right away, see? And I says, "Come on,

we will get the boat ready, get them over." By that time them people launched two boats and they pull over to the man. When they was up to the man, pretty close to him, we consider well, he would be safe, anyway, for the simple reason we didn't swing the boat overboard because he was right alongside of him. [Apostles, p. 112.]

It is not understood what this expert seaman meant by saying: "By that time them people *launched* two boats and they *pull* over to the man."

Obviously he had reference to some two pulling (row boats) hoisted on board some ship or dock, otherwise they could not have been launched.

The activities of this mate are further revealed by the following testimony:

Q. When you heard the cry "Man overboard!", did you not testify you walked from the lumber pile to the port side near where the captain was standing?

A. Yes, walked all around.

Q. Then where did you go after walking all around?

A. I walked right aft to the boat.

Q. You saw this man in the water then?

A. Yes, I saw him in the water.

Q. And you kept looking where the man was in the water?

A. And I say, "We better get the boat over".

Q. Then you noticed the boats were coming?

A. From the dredges.

Q. And you also noticed the pilot boat was coming there?

A. Yes.

Q. And you kept looking at them and seeing what they were doing?

A. Yes.

Q. How long were you in that position of observation?

A. I guess from the time I go from fore to aft, about three or four minutes, something like that. [Apostles, pp. 135, 136.]

We come now to Chief Engineer Brown, whom proctor for appellee tried to qualify as an expert on seamanship, especially in the handling of ships and the use and equipment of life boats. [Apostles, p. 202-203.] He testified, "I was all over the stern all the time." [Apostles, p. 204.]

Q. Where were you at the time the man fell overboard?

A. On the upper deck aft.

A. I heard them holler "Man overboard", rushed to the *side* and *started* to get a life buoy, but I seen it was too late so I didn't get one.

Q. Did you see anyone throw a life buoy from the Brunswick?

A. Yes. Charlie, a sailor came by and a man was trying to get one out and Charlie came up and pulled it out and throwed it overboard.

A. A partner of this man overboard was trying to get one out and wasn't making much of a success and Charlie, the sailor—" [Apostles, p. 198.]

Here, then, was this witness who, under oath, fully described considerable about a ship and the handling of life boats and their equipment, standing supinely

by near Gallagher who was struggling to get the life buoy adrift to rescue his fellow man.

Even the master of the ship was watching according to his own testimony, as follows:

Q. It (life preserver thrown by pilot) struck on top of the man?

A. Almost, as near as I could see. *I was watching.* [Apostles, p. 90.]

Q. Gallagher. By Mr. Crider. You saw them back there working at the life boat, did you?

A. They stood there; they didn't attempt to do anything.

Q. You didn't see them do anything with the life boat?

A. No, they didn't attempt. Just stood there looking around. [Apostles, p. 172.]

With the exception of the disconnected, belated and futile efforts of Seaman Gibson to throw a life buoy overboard to the deceased, four to six minutes after man fell overboard from a vessel, which continued going ahead, the only move all the others made was to take up and maintain a position of observation.

On board ships there is nothing which fires the blood, which excites the noblest impulses, and which stirs men to acts of heroism and self-sacrifice, than the "Cry of Man Overboard". To proctor for appellant, who has been 31 years at sea, and who has often fallen or been washed overboard at sea, and who has more frequently seen others so situated, it is unthinkable and unbelievable that red-blooded men could stand supinely by in a position of observation and inaction, while a

human being pitifully and helplessly struggles for his life in the water. This is the first case he has known or even heard of, and it is satisfactorily accounted for, that they did nothing, because they did not know what to do, or how to do it. From the master to the seamen, none of them had even elementary knowledge of seamanship, nor did they understand or use even the common language of the sea, or of ships, and ship equipment.

Point VI.

General Admiralty and Statutory Law.

It is earnestly contended that the evidence in this case clearly proves that appellee has violated the following rules of admiralty law and the following provisions of statutory law, and that these violations of law have been the direct result of, or have contributed to, the death of deceased.

In Pacific American Fisheries v. Hoof, 291 Fed. (C. C. A. 9th Cir.) 306, at page 308, this court held:

> * * * "The duty of the master to provide a safe working place and safe appliances is a positive and continuing one, and cannot be delegated. * * * As already stated, the duty is a continuing one, and notice of defects and dangers will be imputed to the master where they could have been discovered by reasonable inspection and by the exercise of reasonable care."

At page 311, this court went on to say:

> "But there was here a failure to supply and keep in order the proper appliances appurtenant to the ship."

Again, at page 310, this court in speaking of decisions of the Washington Supreme Court in construing a statute of that state, said:

> "These decisions rest entirely upon the construction of a state statute, and that construction, whether right or wrong, is controlling upon the federal courts where no federal question is involved."

Following this cardinal rule of construction of State Statutes, as the right of action in this case was given by the statute of California, appellant copied the language of that statute from a decision of this court in Western Fuel Company v. Garcia, 255 Fed. 817, 819, 820, in pp. 50, 51 and 52 of her printed brief, and in pages 70, 71, 72 and 73, thereof, cited in *en extenso* two decisions of the courts of this state construing that statute, which have since not been reversed.

In The Rolph, 299 Fed. 52, at page 54, this court held:

> "*In re* Pacific Mail S. S. Co., 130 Fed. 76, 64 C. C. A. 410, this court held that it is the duty of the owner of a ship carrying goods and passengers, not only to provide a seaworthy ship, but also to provide the ship with a crew adequate in number and competent in their duties with reference to all the exigencies of the intended route, and that such a duty rests upon the owner by the

> general maritime law. In Lord v. G. N. & P. S. Co., 4 Sawy. 292, Fed. Cas. No. 8,506, it was held to be the duty of the owner to provide a vessel with a competent master and a competent crew, and to see that the ship when she sails is in all respects seaworthy, and that he is bound to exercise the utmost care in these particulars. In Adams v. Bortz (C. C. A.), 279 Fed. 521, it was said that the basic thought is that the vessel shall be equipped to perform the duty which she owes to the human beings on board her, and the cargo which she carries.

Surely no one can say that the Brunswick had a competent master and a competent crew, and that the deck crew was adequate in number.

There was a violation of Act March 4, 1915, Chap. 153, Sec. 13, 38 Stat. 1169, which prohibits the shipping of any seaman without examination.

There was a specific breach of Sec. 4602, R. S., the pertinent parts of which reads as follows:

> "Any master of or any seaman, * * * belonging to any merchant vessel, * * * or who by willful breach of duty, or by neglect of duty, or by reason of drunkenness, refuses or omits to do any lawful act proper and requisite to be done by him * * * for preserving any person belonging to or on board of such ship from immediate danger to life or limb * * *'

There was a breach of Sec. 5344, R. S. as amended, Sec. 282 Criminal Code, which provides:

> "Every captain, engineer, pilot or other person employed on any steamboat or vessel, by whose

misconduct, *negligence* or *inattention to his duties* on such vessel the life of any person is destroyed, or any owner charterer, inspector, or other public officer, through whose fraud, *neglect,* etc., shall be fined ten thousand dollars, or imprisoned not more than ten years, or both * * *"

There was a violation of Art. 24, Inland Rules of the Road, in that the master of the Brunswick through gross incompetency, and culpable inefficiency, abandoned the deceased to his fate while struggling in the water, in order, as he testified, to let an overtaking vessel pass him. The M. J. Rudolph, 292 Fed. (C. C. A. 2nd Cir.) 740-42, The Steamship City of Washington, 92 U. S. 31-41, 23 L. Ed. 600.

There was a breach of Art. 29 of the Inland Rules of the Road, which reads:

"Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the *neglect of any precaution* which may be *required by the ordinary practice* of *seamen,* or by the *special circumstances of the case.*"

There was a specific breach of Sec. 4488, R. S., as amended by 39 Stat. 334, in reference to the stowage and availibility of life boats, a part of which reads:

* * * "And that all the boats and pontoon rafts on the ship with the gear appertaining to them *are always ready for immediate use.*"

In this connection, attention is again invited to the condition of the boat of the Brunswick, not only was she not suspended from the davits, but she was permanently secured in the skids, etc., and the gear (boat falls) appertaining, to it, was not ready for immediate use, but, as testified by the first mate, were stowed in the boat in such a way that he had to clear the halyards (boat falls).

There was a deliberate breach of the same sec. in reference to the stowage of life buoys, heretofore referred to.

There was a breach of sec. 4561, R. S., Sec. 7581 Barnes Federal Code, a part of which reads:

> "* * * If any person knowingly send or attempts to send or is a party to sending or attempting to send an American ship to sea, in the foreign or coasting trade, in such an *unseaworthy state that the life of any person is thereby endangered,* he shall, in respect of each offense, be guilty of a misdemeanor. * * *." The Fullerton, 167 (C. C. A. 9th Cir.) at page 10.

Finally, we have a decision of this court in The Thielbek, 241 Fed. (C. C. A. 9th Cir.) at page 216, in which it was held:

> "* * * It is well settled that, where a vessel has committed a positive breach of a statutory duty, she must show, not only that her fault did not contribute to the disaster, but that it could not have done so. Citing cases."

In this connection attention is respectfully invited to the fact that this court, in page 6 (middle of page) of its opinion, in this case, held:

> "A careful reading of the evidence satisfies us that the unfortunate fall of the deceased into the water was a pure accident.'

This is tantamount to holding that the fall of the deceased into the water was an inevitable accident, and, therefore, negatives contributory negligence on part of the deceased.

Now, in reference to Inevitable Accident, *in re* Reichert Towing Line, 251 Fed. (C. C. A. 2nd Cir.) 214, at page 217, that court held:

> "However, even in tort cases, where there is no contractual liability one relying upon inevitable accident as a defense must either point out the precise cause, and show that he is in no way negligent in connection with it, or he must show all possible causes, and that he is not in fault in connection with any of them." Certiorari denied, 248 U. S. 565.

It is respectfully submitted that appellee in this case has pointed out nothing except gross incompetency, culpable inefficiency, and absolute failure to take any action, efficient or otherwise, towards rescuing the deceased, but delegated that duty to others of unknown qualifications, and stood supinely by in a position of observation, while the latter, in their belated, yet earnest and efficient efforts, attempted to rescue the deceased.

Again, this court in Murray v. Southern Pacific Co., 236 Fed. (C. C. A. 9th Cir.) 704, at page 706, defined and clearly stated the rule and effect of an affirmative plea of Contributory Negligence, as follows:

> "Contributory negligence is a want of ordinary care upon the part of the person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred."
>
> "It follows that the defense that the injured person is chargeable with contributory negligence concedes that there was actionable negligence on the part of the defendant."

Now, this court having found that the fall into the water of the deceased was a pure accident, and, therefore, that he was not contributorily negligent, and, as the appellee filed an affirmative plea of Contributory Negligence by stipulation [Apostles, p. 229], it follows as a logical consequence, that there was actionable negligence on the part of the defendant, (appellee).

In view of the foregoing, and especially the fact that both the district court and this court appear to have fallen into the error that there were three boats nearer and better qualified to rescue the deceased than was the Brunswick, and upon which the opinions of both courts seem to have been predicated, appellant respectfully and most earnestly prays that the above entitled cause be reopened for further consideration by this court, and for rehearing and further argument.

Dated, San Pedro, California, November 8, 1924.

JOHN J. MONAHAN,
Proctor for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am the proctor for appellant and petitioner in the above entitled cause, that in my judgment this petitioner has a meritorious cause of action, and that this petition for rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing and reconsideration is not interposed for delay.

Dated, San Pedro, California, November 8, 1924.

JOHN J. MONAHAN,
Proctor for Appellant and Petitioner.

No. 4312

United States

Circuit Court of Appeals

For the Ninth Circuit.

GLEN FULKERSON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court, Western District of Washington, Northern Division.

May, 1923, Term.

No. 7934.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GLEN FULKERSON, LUELLA NULPH, and RUTH MILLER,
Defendants.

*Page-number appearing at foot of page of original certified Transcript of Record.

INFORMATION.

BE IT REMEMBERED, that Thos. P. Revelle, Attorney *of* the United States of America for the Western District of Washington, who for the said United States in this behalf prosecutes in his own person, comes here into the District Court of the said United States for the District aforesaid on this 20th day of September, in this same term, and for the said United States gives the Court here to understand and be informed that as appears from the affidavit of Walter M. Justi, made under oath, herein filed: [2]

COUNT I.

That on the tenth day of September, in the year of our Lord one thousand nine hundred and twenty-three, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, GLEN FULKERSON, LUELLA NULPH, and RUTH MILLER then and there being, did then and there knowingly, willfully, and unlawfully have and possess certain intoxicating liquor, to wit, twenty-seven (27) pints of a certain liquor known as distilled spirits, twenty-seven (27) quarts of a certain liquor known as beer, two (2) one-fifth gallons and fifteen (15) ounces of a certain liquor known as whiskey, and twenty-five (25) ounces of a certain liquor known as gin, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes,

a more particular description of the amount and kind whereof being to the said United States Attorney unknown, intended then and there by the said GLEN FULKERSON, LUELLA NULPH, and RUTH MILLER for use in violating the Act of Congress passed October 28, 1919, known as the National Prohibition Act, by selling, bartering, exchanging, giving away, and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said GLEN FULKERSON, LUELLA NULPH and RUTH MILLER, as aforesaid, was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [3]

And the said United States Attorney for the said Western District of Washington further informs the Court:

COUNT II.

That on the tenth day of September, in the year of our Lord one thousand nine hundred and twenty-three, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, GLEN FULKERSON, LUELLA NULPH, and RUTH MILLER then and there being, did then and there knowingly, willfully, and unlawfully sell certain intoxicating liquor, to wit, fifteen (15) ounces of a certain liquor known as whiskey, and one (1) ounce of a certain liquor known as gin, then and there containing more than one-half of one per centum

of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, and which said sale by the said GLEN FULKERSON, LUELLA NULPH, and RUTH MILLER, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [4]

And the said United States Attorney for the said Western District of Washington further informs the Court:

COUNT III.

That on the tenth day of September, in the year of our Lord one thousand nine hundred and twenty-three, at the City of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, and at a certain place situated at Apartment F, 515 Seneca Street, in the said City of Seattle, GLEN FULKERSON, LUELLA NULPH, and RUTH MILLER then and there being, did then and there and therein knowingly, willfully, and unlawfully conduct and maintain a common nuisance by then and there manufacturing, keeping, selling, and bartering intoxicating liquors, to wit, distilled spirits, beer, whiskey, gin, and other intoxicating liquors containing more than one-half of one per centum of alcohol by volume and fit for use for beverage pur-

poses, and which said maintaining of such nuisance by the said GLEN FULKERSON, LUELLA NULPH, and RUTH MILLER, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOS. P. REVELLE,
United States Attorney.
J. W. HOAR,
Assistant United States Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 20, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [5]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GLEN FULKERSON, LUELLA NULPH, et al.,
Defendants.

ARRAIGNMENT AND PLEA.

Now, on this 5th day of November, 1923, the above defendants Fulkerson and Nulph come into

open court for arraignment accompanied by the attorney F. C. Reagan and say that their true names are Glen Fulkerson and Luella Nulph. Whereupon each defendant here and now enter their pleas of not guilty.

Journal No. 11, page No. 374. [6]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLEN FULKERSON, LUELLA NULPH, and RUTH MILLER,

Defendants.

TRIAL.

Now, on this 26th day of February, 1924, this cause comes on for trial with defendants Fulkerson and Nulph present in open court. Wilmon Tucker is present as attorney for defendant Fulkerson, and John F. Dore present as attorney for defendant Nulph. C. T. McKinney is present as counsel for the Government. Defendant Ruth Miller is called and there is no response. Defendant Miller is called three times in the corridor of the court and there is no response. It is ordered that the bail of said defendant Ruth Miller be forfeited *nisi* and that a bench warrant issue for her arrest. Where-

upon all parties being present, a jury is empaneled and sworn as follows: Martin L. Jones, E. D. Briggs, Clement W. Bales, John Dolan, Eug Bukies, Fred Besselman, Heman Austin, William S. Burt, Louis D. Jordon, Charles H. Alden, Emil J. Peschau and J. A. Turner. Opening statement is made to the jury by counsel for the Government. Government witnesses are sworn and examined as follows: Walter M. Justi, Gordon B. O'Hara and C. W. Kline, Government exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, and 13 are introduced as evidence. Defendants' Exhibit "A" is introduced as evidence. Government rests. Motion by defendant Luella Nulph was made to dismiss count II as to her. Said motion is denied and an exception is allowed. Defendant's witnesses are sworn and examined as follows: Glen Fulkerson, John Volsuano and Richard Burr. Defendant rests. Government Exhibit 14 is introduced as evidence. Defendant Nulph renews her motion for a directed verdict on Counts I, II and III. Said motion is denied with exception allowed. Defendant Fulkerson moves for a directed verdict as to him on counts I, II, and III. Said motion is denied and exception allowed. Said cause is now argued to the jury for both sides. During the course of the argument for defendant, the U. S. Attorney moved for a directed verdict of not guilty on all three counts as to defendant Nulph. Motion is granted and the clerk was ordered to enter a verdict of not guilty on all counts of the information as to defendant Luella Nulph and judgment is now so entered.

The jury is instructed by the Court and retires for deliberation. Jury came into court at 4:40 P. M. Defendant Fulkerson and attorneys for both sides are present. Jury is called and all are present. A verdict of guilty on all counts as to defendant Fulkerson is returned. Verdict reads as follows: We, the jury in the above-entitled cause, find the defendant, Glen Fulkerson, is guilty as charged in Count I of the information herein; and further find the defendant, Glen Fulkerson, is guilty as charged in Count II of the Information herein; and further find the defendant, Glen Fulkerson, is guilty as charged in Count III of the information herein. Charles H. Alden, Foreman. Verdict is ordered filed and sentence continued to March 3, 1924. Defendant is allowed to go on present bail.

Journal No. 11, page No. 72. [7]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLEN FULKERSON and LUELLA NULPH,

Defendants.

VERDICT.

We, the jury in the above-entitled cause, find

the defendant, Glen Fulkerson, is guilty as charged in Count I of the Information herein; and further find the defendant, Glen Fulkerson, is guilty as charged in Count II of the Information herein; and further find the defendant, Glen Fulkerson, is guilty as charged in Count III of the Information herein.

CHARLES H. ALDEN,
Foreman.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Feb. 26, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [8]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7934.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

GLEN FULKERSON, LUELLA NULPH and RUTH MILLER,
Defendants.

MOTION FOR NEW TRIAL.

Comes now the defendant Glen Fulkerson, and moves the Court for an order granting him a new trial of the above-entitled cause on the ground and

for the following reasons materially affecting the substantial rights of this defendant, to wit:

1st. Irregularity in the proceedings of the Court, jury and adverse party and orders of the Court and abuse of discretion by which this defendant was prevented from having a fair trial.

2d. Insufficiency of the evidence to justify the verdict and that it is against the law.

3d. Errors in law occurring at the trial excepted to at the trial by this defendant.

This motion is based upon the files, records and pleadings herein and upon all of the rulings of the Court and proceedings had and taken in the above-entitled cause and upon the minutes of the Court therein, and defendant, in support of the aforesaid motion, will rely upon the following *inter alia* errors which it is alleged were committed during the trial of the aforesaid cause:

1st. The Court erred in not directing the jury to return a verdict of not guilty as against this defendant on Count I. [9]

2d. The Court erred in not directing the jury to return a verdict of not guilty as against this defendant on Count 2.

3d. The Court erred in not directing the jury to return a verdict of not guilty as against this defendant on Count 3.

4th. The Court erred in refusing to direct the jury to return a verdict of not guilty against this defendant upon all the counts of this information.

5th. The Court erred in stating to the jury that he did not believe the evidence of the defendant,

Fulkerson, and in expressing to the jury his opinion of what the fact *of* facts were on the ground that it was an infringement of the right of this defendant to have the jury pass upon the fact of his guilt and prevented him from having a fair and impartial trial as provided by the Constitution of the State of Washington and of the United States of America.

6th. The Court erred in its definition to the jury of a nuisance under the terms of the Volstead Act.

7th. The Court erred in instructing the jury with reference to the punishment for violations of the Volstead Act as constituting an error prejudicial to the right of the defendant to have a fair trial as guaranteed by the Constitution.

TUCKER, HYLAND & ELVIDGE,
Attorneys for Defendant, Glen Fulkerson.

Received a copy of the within motion for new trial, 29th Feb., 1924.

THOS. P. REVELLE,
Attorney for plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 1, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [10]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLEN FULKERSON,

Defendant.

DECISION (ON MOTION FOR NEW TRIAL).

(Filed March 26, 1924.)

The defendant was convicted of violation of the National Prohibition Act. He has moved for a new trial, alleging the statutory grounds and the further ground that the trial Judge expressed to the jury his opinion of what the facts were, and thereby infringed the defendant's right of trial by jury, and erred in defining a nuisance.

The Court in its instructions, after referring to the issue and law applicable and the testimony on behalf of the parties, said:

" * * Now the defendant says that he was in the hall; that he did have his coat off, as the officers of the Government say he did; that he did come into the room with the bottle of whiskey in his hand; that he did deliver to one of these men the bottle and did receive $5.00. Now that far the testimony harmonizes. Now he said that the woman gave it to him; he did not know what it was; told him to give it to the men, and he did it; then the

officers came in and they found the $5.00 in his hand, just as the officers testified they did. Now he was asked whether the bottle was wrapped up; he said no. He said he did not know what was in the bottle. It is for you to determine the fact. Now if he was in the hall, and if this woman gave him the bottle and told him to deliver it to these men, and he did not know what was in the bottle and received the $5.00 without knowing what was in the bottle, or what he was doing; if you believe that, then he is not guilty, because he didn't know what was in the bottle. If you believe that a man could be on the police force in Seattle for three years and have a flask like that passed to him, with that color of contents,—a man on the police force, and not knowing it was whiskey or prohibited spirits provided by the Volstead law and the Prohibition amendment, then you must conclude that way, because it is for you to determine what the fact is. Now I don't want you to conclude from any opinion you may think I have of the facts. I don't believe a word of it myself. I believe he knew what was in the bottle; but that must not control you; you must find the fact. While I have a right to tell you what I think about the facts, you must not be controlled by what I think about them; you must weigh [11] all of the testimony and all of the circumstances and determine what the truth is. If you have a reasonable doubt as to the fact, then you should return a verdict of not guilty. But if you are convinced beyond a reasonable doubt that he did know what was in the bottle, then it is your

duty to return a verdict of guilty on the first count, and of guilty on the second count, because the possession of that one bottle would be sufficient to violate the law, as charged in this information, of possession and sale.

Now as to the next count, the count of the common nuisance. This is what the law says: 'Any rooming house or building where intoxicating liquor is kept in violation of the National Prohibition Act is declared to be a common nuisance.' Now if he was in possession of this liquor in the kitchen, if you believe he was in possession of that, and believe it was kept there, then you must find it was in violation of the National Prohibition Act, because he had no right to keep it there; and then if you find that this annoyed such part of the public that came in contact with it, and was not authorized by law under the National Prohibition Act, such would be a nuisance, and if you believe that beyond a reasonable doubt, then it would be your duty to return a verdict of guilty upon Count 3. But if you have a reasonable doubt upon that, then you will return a verdict of not guilty.

Now in these instructions, Gentlemen of the jury, I have related and referred to the facts or testimony and the circumstances with a view of illustrating or demonstrating some proposition of law which has its application to the facts, and have expressed some personal opinion, but I do not want you to be controlled by it in any sense, but I want you to conclude upon the evidence itself, so that the law may be administered fairly, if the law has been violated

that it may be enforced, and the parties who violate it be punished. When courts cease to function properly then may God have mercy upon the people of the United States. Law is a rule of civil conduct prescribed by a superior power, and persons must regulate their conduct with relation to that law. It is a rule by which people shall live, and when they violate that rule, then they must be punished; that is the only way we can have government; and when courts and juries won't function it will only be a short step to a condition of anarchy.

If you believe that the defendant went on the stand and perjured himself with a view of escaping a penalty, you will so conclude. Pass upon this fairly. It is your duty as twelve fair-minded men to give the defendant a square deal; he is entitled to it; the Government is entitled to a square deal; give it a fair and square deal in this case, and if you have a reasonable doubt upon all the circumstances developed here, you will resolve it in favor of the defendant; if you are convinced beyond a reasonable doubt, then return a verdict of guilty in this case, as your conscience dictates, and the right and truth is." [12]

C. T. McKINNEY, Asst. U. S. Attorney, for United States.

Messrs. TUCKER, HYLAND & ELVIDGE, Attorneys for Deft.

NETERER, D. J.—In the federal courts a Judge has the right to express an opinion upon the evidence,—Horning vs. Dist. of Columbia, 254 U. S.

135; Robinson vs. U. S., 290 Fed. 755; Dillon vs. U. S., 279 Fed. 639; Van Gunder vs. Iron Co., 52 Fed. 838, and no objection can be successfully urged if the Judge expresses his opinion as to the guilt or innocence of the accused providing the jury is given unequivocally to understand that it is not bound by the expressed opinion of the Judge, but that the jurors must conclude upon the facts themselves. No error is apparent in the record and the motion for new trial is denied.

NETERER,
U. S. District Judge.

Cases cited by the defendant:

Hicks vs. U. S., 150 U. S. 442 (450).
Reagan vs. U. S., 157 U. S. 301.
Lovejoy vs. U. S., 128 U. S. 171.
Starr vs. U. S., 153 U. S. 614 (624).
Smith vs. U. S., 161 U. S. 85.
Millen vs. U. S., 106 Fed. 892.
Foster vs. U. S., 188 Fed. 308.
Oppenheim vs. U. S., 241 Fed. 625.

Other cases pertinent to the issue:

Rudd vs. U. S., 173 Fed. 912.
Sparf & Hansen vs. U. S., 156 U. S. 51.
Rucker vs. Wheeler, 127 U. S. 85–95.
Graham vs. U. S., 231 U. S. 474–80.
Young vs. Corrigan, 210 Fed. 442.
Dillon vs. U. S., 279 Fed. 639–42.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 23, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [13]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLEN FULKERSON,

Defendant.

SENTENCE.

Comes now on this 14th day of April, 1924, the said defendant, Glen Fulkerson, into open court for sentence and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said, wherefore, by reason of the law and the premises it is considered ordered and adjudged by the court that the defendant is guilty of violating the National Prohibition Act and that he be punished by being imprisoned in the King County Jail or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for the period of six months on Count II of the Information and a period of six months on Count III of the Information, terms to run concurrently and to pay a fine of $500.00 *Dollars* on Count I of the Information. And

the defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree Book No. 4, Page No. 99, [14]

In the District Court of the United States for the Western District of Washington, Northern, Division.

No. ——.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLENN FULKERSON,

Defendant.

PETITION FOR WRIT OF ERROR.

Comes now the above-named defendant, Glenn Fulkerson, by his attorney and counsel, Edward H. Chavelle, and Tucker and Hyland, and respectfully shows that on the 26th day of February, 1924, a jury empanelled in the above-entitled court and cause, returned a verdict finding said Guy Fulkerson guilty of the indictment heretofore filed in the above-entitled court and cause, and thereafter within the time limited by law, under rules and order of this Court, defendant moved for a new trial, which motion was by the Court overruled, and exception allowed thereto, and likewise, within said time filed his motion for arrest of judgment, and which was by the Court overruled, and to which an

exception was allowed; and thereafter on the 14th day of April, 1924, this defendant was by order and judgment of the above-entitled Court in said cause sentenced.

And your petitioner feeling himself aggrieved by this verdict, and the judgment and sentence of the Court entered herein as aforesaid, and by the orders and rulings of said Court, and proceedings in said cause, herewith petitions this Court for an order allowing him to prosecute a writ of error from said judgment and sentence, to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States, and in accordance with the procedure of said Court made and provided, to the end that said proceedings as herein recited, and as more fully set forth in the [15] assignments of error presented herein, may be reviewed and manifest error appearing upon the face of the record of said proceedings, and upon the trial of said cause, may be by said Circuit Court of Appeals corrected, and that for said purpose a writ of error and citation thereon should issue as by law and ruling of the Court provided, and wherefore, premises considered, your petitioner prays that a writ of error issue, to the end that said proceedings of the District Court of the United States for the Western District of Washington, may be reviewed and corrected, said errors in said record being herewith assigned, and presented herewith, and that pending the final determination of said writ of error by said Appellate Court, an order may be entered herein that all further proceedings be suspended and

stayed, and that pending such final determination, said defendant be admitted to bail.

TUCKER & HYLAND and
EDWARD H. CHAVELLE,
Attorneys for Defendant.

315 Lyon Building,
Seattle, Washington.

Due service of within petition for writ of error admitted and receipt of copy thereof acknowledged this —— day of April, 1924.

_____,
U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 15, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [16]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GLENN FULKERSON,
Defendant.

ORDER ALLOWING WRIT OF ERROR.

On this 15th day of April, 1924, came the defendant, Glenn Fulkerson, by his attorney, Edward H.

Chavelle, and Tucker & Hyland and files herein and presents to the Court his petition praying for the allowance of a writ of error and assignment of error, intended to be urged by him, praying also, that a transcript of the records and proceedings and papers upon which judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District, and that such other and further proceedings may be had as may be proper in the premises;

On consideration whereof, the Court does allow the writ of error and upon the defendant giving bond according to law, in the sum of $2,000.00, which shall operate as a supersedeas bond.

Dated at Seattle, Washington, this 15th day of April, 1924.

JEREMIAH NETERER,
Judge.

Received a copy of the within Order this 15th day of April, 1924.

THOS. P. REVELLE,
M.,
U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 15, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [17]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLENN FULKERSON,

Defendant.

ASSIGNMENTS OF ERROR.

Now comes the above-named defendant, Glenn Fulkerson, by Edward H. Chavelle and Tucker & Hyland, his counsel, and says that in the record and proceedings in the above-entitled case, there is manifest error, in this, to wit:

1. The Court erred in allowing testimony to go to the jury during the trial of the case, over the objection of defendant's counsel, which was excepted to, and exception allowed.

2. The Court erred in refusing to grant the motion of the defendant for a dismisal of the information in this cause, for the reason and upon the ground that sufficient evidence had not been produced to constitute a crime.

3. The Court erred in overruling the motion of the defendant for a directed verdict of acquittal, made at the close of the entire case, and before it was submitted to the jury.

4. The Court erred in denying the motion of the

defendant for a new trial, which motion was made in due time after the jury had returned a verdict of guilty as charged in the indictment.

5. The Court erred in denying the motion of the defendant in arrest of judgment, which motion was made in due time after the jury had returned a verdict of guilty as charged in the information.

6. That the Court erred in its instructions to the jury, which said instructions were duly excepted to at the time of [18] trial, and said exception allowed.

WHEREFORE, the said Glenn Fulkerson, defendant above-named, prays that the judgment be reversed, and that the said Court be directed to grant a new trial of said cause.

TUCKER & HYLAND and
EDWARD H. CHAVELLE,
Attorneys for Defendant.

315 Lyon Building,
Seattle, Washington.

Received copy of within Assignment of Errors this 15th day of April, 1924.

THOS. P. REVELLE,
U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 15, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [19]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7934.

GLENN FULKERSON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BOND ON APPEAL.

We, Glenn Fulkerson, as principal, and Sidney Brunn and Leo C. Jacobson, as sureties, all of Seattle, Washington, jointly and severally acknowledge ourselves to be indebted to the United States of America in the sum of $2,000.00, lawful money of the United States, to be levied on our goods and chattels, lands and tenements, for the payment of which, well and truly to be made, we bind ourselves and each of us, our heirs, and executors, jointly and severally by these presents.

The condition of the above obligation is such, that whereas in the above-entitled cause a writ of error has been issued to the Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence entered therein, and an order has been entered fixing the amount of the bail bond for the release of the defendant Glenn Fulkerson, upon bail, pending the determination of said writ of error by said appellate court, in the sum of $2,000.00.

Now, therefore, if the said Glenn Fulkerson, as principal shall appear and surrender himself in the above-entitled court and from time to time thereafter as may be required, to answer any further proceedings, and shall obey and perform any judgment or order which may be had or rendered in said cause, and shall abide by and perform any judgment or order which may be rendered in the said United States Circuit Court of Appeals for the Ninth Circuit, [20] and shall not depart from said District without leave first having been obtained from the Court, then this obligation shall be null and void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, we have set our hands and seals this 15th day of April, 1924.

GLEN FULKERSON,
Principal,
SIDNEY BRUNN,
LEO C. JACOBSON,
Sureties.

United States of America,
Western District of Washington,
Northern Division,—ss.

Sidney Brunn and Leo C. Jacobson, being first duly sworn, on oath each for himself and not one for the other, deposes and says: that he is a resident of the above District, and that after paying all just debts and liabilities, he is worth the sum of $4,000.00 in real property subject to execution within said District, over and above all exemptions, and ex-

clusive of community interests, being his sole and separate property.

LEO C. JACOBSON.
SIDNEY BRUNN.

Subscribed and sworn to before me this 15th day of April, 1924.

[Seal] EDWARD H. CHAVELLE,
Notary Public in and for the State of Washington,
Residing at Seattle.

O. K.—MATTHEW W. HILL,
Asst. U. S. Attorney.

Approved.

NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 15, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [21]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GLEN FULKERSON et al.,
Defendants.

ORDER EXTENDING TIME TO AND INCLUDING JUNE 19, 1924, FOR FILING, SERVING AND SETTLING BILL OF EXCEPTIONS.

For good cause now shown, it is ORDERED that the time for serving, filing and settling bill of exceptions in the above-entitled cause be and it is hereby extended to the 19th day of June, 1924.

Done in open court this 12th day of May, 1924.

JEREMIAH NETERER,
Judge.

O. K.—C. T. McKINNEY,
Asst. U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 12, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [22]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GLEN FULKERSON et al.,
Defendants.

ORDER EXTENDING TIME TO AND INCLUDING JULY 15, 1924, TO FILE RECORD.

For good cause shown, it is ORDERED that the time for filing the record in the above-entitled cause, in the office of the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be and the same is hereby extended to the 15th day of July, 1924.

Done in open court this 25th day of June, 1924.

JEREMIAH NETERER,
Judge.

O. K.—C. T. McKINNEY,
Asst. U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 25, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [23]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GLEN FULKERSON et al.,
Defendants.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that this cause came on regularly for trial on the 26th day of February, 1924, before the Honorable Jeremiah Neterer, one of the Judges of the above-entitled court, sitting with a jury, duly empanelled and sworn.

The Government appearing by Thomas P. Revelle and C. T. McKinney, District Attorney and Assistant District Attorney, respectively.

The defendant, Glen Fulkerson, appearing by Messrs. Tucker, Hyland & Elvidge, and the defendant Luella Nulph, appearing by John F. Dore, Esquire.

The jury having been duly impaneled and sworn to try the cause, and counsel for the plaintiff having made his opening statement to the jury, thereupon the following proceedings were had and done, to wit:

TESTIMONY OF WALTER M. JUSTI, FOR THE GOVERNMENT.

WALTER M. JUSTI, called as a witness on behalf of the Government, being first duly sworn, testified for and on behalf of the Government, as follows:

That he is a Prohibition Agent; that he visited the Metropolitan Apartments, Apartment F, with Agent O'Hara; that the door was opened by Ruth Miller, who invited them into the room; [24] that he then inquired if she had any drinks of liquor, and she said "Yes," and Justi told her he would

(Testimony of Walter M. Justi.)

like some Scotch whiskey, and O'Hara said he would like some gin; she returned to the room with a serving glass full of gin in her hand, and a flask of whisky in the pocket of her dress; she delivered the gin to O'Hara and then served Justi from the flask of whisky; O'Hara asked her how much it would be for the bottle. She said, "Well, they are five dollars apiece." O'Hara said, "Well, I will give you $5.00 for these two drinks and what is left in the bottle." She said, "I will see," and went outside. After a few minutes the door opened and Mr. Fulkerson came in, and said, "It is all right for the five," and passed the bottle to O'Hara and received $5.00 in payment. Witness then notified Fulkerson that he was under arrest. Agent Kline took the $5.00 bill which had been previously marked, and the search-warrant was served, and they went through the rest of the apartment; in the kitchen they found a quantity of moonshine whisky, home brew beer and some gin; in the stairway of the bathroom, they found 2 quarts of whisky, in the upper drawer of the dresser there were a number of men's shirts and socks and underwear, collars, handkerchiefs, and neckties, and also some memorandum, papers and receipts showing that the telephone there was paid in Fulkerson's name.

Mr. TUCKER.—I object to that as not being the best evidence.

The COURT.—Sustained.

A few days after he was arrested, Agent Justi further testified, Fulkerson stated he had helped

(Testimony of Walter M. Justi.)

Mrs. Nulph get established in business, because she was a widow with two or three children; that Mrs. Nulph was not there at the time Fulkerson was arrested, but subsequently entered the premises, and was arrested by Justi. [25]

Q. Now, continue with what Fulkerson told you.

A. Fulkerson told me that he had established Mrs. Nulph there.

Mr. DORE.—I take it this statement would not be binding on anybody but Mr. Fulkerson, after the arrest.

The COURT.—This statement would not be binding only upon the defendant Fulkerson, not against the woman, Mrs. Nulph.

Mr. TUCKER.—I will object to it on the ground it does not tend to prove anything as against Fulkerson, what he said with reference to establishing her.

The COURT.—Overruled.

Mr. TUCKER.—Exception.

Q. (By the COURT.) State what was said.

Witness Justi further testified that he had helped establish Mrs. Nulph in the apartments and bootlegging game, because she had two or three children; that when they were searching the place Fulkerson assisted, and said that the liquor upon the upper shelf in the kitchen was "All moon."

On cross-examination, Witness Justi repeated that he had conversation with Mrs. Nulph, one of the defendants, and she stated it was her home. Agent Justi further identified the plan of the rooms,

(Testimony of Walter M. Justi.)
and the room in which some of the clothing of Fulkerson was found.

On redirect examination, witness Justi identified diagram of the house, and more specifically a room in which was found some of the clothing of Fulkerson, his handcuffs, his pistol and his club; that the defendant Miller went out in the hallway and the defendant Fulkerson came in.

TESTIMONY OF GORDON B. O'HARA, FOR THE GOVERNMENT.

GORDON B. O'HARA, called as a witness on behalf of the Government, being duly sworn, testified as follows: [26]

That he is a Federal Prohibition Agent, and has been in the service for four years; that he went with Officer Justi to Apartment F, 515 Seneca Street, known as the Metropolitan Apartments; that they were let in to the premises by a lady who gave her name as Miller; went into the front room; Agent Justi asked the defendant Miller if she had a drink of Scotch, and she said yes. Witness told her he would take gin. She went out and returned with a serving glass containing gin, and a flask containing whiskey; she served witness the gin, and served a drink to Justi from the bottle; he asked her how much for the bottle and she said five dollars. Witness told her he would give her five dollars for the two drinks and what was left in the bottle; she hesitated a moment and said, "Well, I

(Testimony of Gordon B. O'Hara.)
will have to find out," and left the room, and in about two minutes Fulkerson came in with the bottle, and handed it to one of the agents, he does not recall which, and when witness asked him how much it was he said five dollars. Witness asked, "Does that include the two drinks we had?" and he said, "Yes, that is right." Witness then handed him the five dollars. They heard some noise in the hall, and defendant Fulkerson said there is some one outside; Justi said he would go and get them, that they were our friends, and went out; that Fulkerson, still with the $5.00 in his hand went with witness into his room just off the entrance; shortly after Griffith, Justi and Kline came in; Justi showed Fulkerson his badge, and placed the defendant Fulkerson under arrest, and Agent Kline took the five-dollar bill out of his hand; they then proceeded to search the place, and found the liquor hereinbefore described; Fulkerson told them that if they were willing, the Nulph woman would take the fall for the whole thing; that he was a policeman and a particular friend of the Mayor; that there was a telephone in the building; [27] that Fulkerson was dressed in his uniform trousers, of regulation policeman's uniform; did not have coat or vest on.

On cross-examination witness repeated that he found in the room that Fulkerson occupied, several telephone bills in Fulkerson's name, and his clothing; Fulkerson admitted that it was his clothing, also that he maintained a home at 322 Mer-

(Testimony of Gordon B. O'Hara.)

cer Street, where he had a wife and four children; he admitted that he had a room at the premises in question, because he worked in the building next to it, and used this room to sleep in; that the only people in the building when he went in, so far as he knew, were Fulkerson and the Miller woman, and a stranger.

On redirect examination, the witness identified the $5.00 bill he gave to the defendant to pay for the two drinks and the bottle; identified Exhibit No. 13, as the receipted telephone bill for this particular—(place).

Mr. DORE.—It speaks for itself; I object to it.

Mr. McKINNEY.—He is telling what it is.

Witness testified that he found this bill in Fulkerson's room in a drawer; that there were several of them.

TESTIMONY OF C. W. KLINE, FOR THE GOVERNMENT.

C. W. KLINE, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

That he is a Prohibition Agent; that the flask called Government's Exhibit 1, for identification, was the flask regarding which the evidence herein was given; that it contains whiskey, eighty proof, forty alcohol, fit for beverage purposes; that it was found in the premises at 515 Seneca Street; that he took the money out of the hand of defendant

(Testimony of C. W. Kline.)
Fulkerson, and it had been in his custody ever since; identified other exhibits found, that they contained alcohol [28] and were fit for beverage purposes; that he arrested the defendant Fulkerson as soon as he entered the apartment.

On cross-examination, witness testified, that Agent O'Hara went up and tried to make a buy; that he came down, and all four agents went up. He was not there during the negotiations carried on with reference to buying a bottle of whiskey; when he came in they told him the defendant Fulkerson had the money, and they told him to get it, and he reached down and took it out of Fulkerson's hand; Fulkerson was standing in the hall, just to the right of the door as you go in; some alcohol had been taken which was intended for rubbing purposes and were returned to Mrs. Miller by the witness.

On redirect examination, witness testified that he returned the bottles of denatured alcohol two or three days after the arrest.

This was substantially all the testimony offered in support of Government's case. Thereupon the Government rested.

TESTIMONY OF GLEN FULKERSON, ON HIS OWN BEHALF.

GLEN FULKERSON, also called as a witness on his own behalf, being first duly sworn, testified as follows:

That he is one of the defendants in the above-

(Testimony of Glen Fulkerson.)

entitled cause; that he is 34 years of age, and lived at 322 Mercer Street, is married and has four children, and lives with his family; that he had heard the testimony of the Prohibition Agents; that on the 10th of September he lived with his family, and his occupation was that of policeman; that he had been on the force about three and one-half years; that his beat was 7th and University; outside of his occupation as policeman, he was working as a door man, at the Hippodrome, [29] and had been employed there for three months, in addition to his duties as a police officer; that he worked from 8:30 until 1 or 1:15 at night for the Hippodrome; that he walked his beat from 12 until 8 o'clock in the evening, that he rented a room at 515 Seneca Street, and it was one of the rooms of the apartment subject to this controversy; that he had a front bedroom, for three months; that he had a telephone put in his room, at his own expense, and in his own name; that he had nothing to do with the rest of the apartment, and rented the room from Mrs. Nulph, a codefendant, and paid her $15.00 a month for the room; did not know Mrs. Miller, another codefendant; had nothing to do with the whiskey in the case; had nothing to do with selling it; what happened on this particular occasion was that he had received a check for one-half month's pay from the Police Department; the pay was short, and the Captain told him to go in and see the Commissioner and have it fixed; that he had gone in and had it fixed, and came up to get his

(Testimony of Glen Fulkerson.)

things in this room; that on the 1st of September he started working nights, and his beat was changed to Washington Street; that this was on the 10th of September, 1923; that he had had the room up to the 1st, and never had taken his things away, and came on this day to get his things; that the 30th day of August was the last time he had been there previous to his arrest; the landlady had taken the room over from the first to the 10th of September, after he had left; he was there only to get his clothes and what things he had left there; that he came back from the station after having his check fixed up, and his wife, brother and sister were out in the car in front of the building waiting for him to get his things; these things included a uniform which he wore during the summer months on the afternoon shift, and other clothing; that it was about 2:15 or 2:30; that all the tenants in the flat had a key for the outside door; there are [30] two or three tenants in each flat, and have a key to enter the room which was right to the left; that he took off his coat and hat, and went to the lavatory; after he left the lavatory and came up through the hall, a lady, who has since been identified as Mrs. Miller, came from the front room, not his room, and said, "Here is this bottle of yours. It ought to be pretty good for your rheumatism." He said, "I don't know anything about it," and she looked at him, and said, "Where did you come from?" Witness said, "I came from the lavatory," and she said, "You just hand it to them" and she

(Testimony of Glen Fulkerson.)

opened the door, and Fulkerson stepped in. There were two gentlemen in the front room, and he handed one of them the bottle, and he gave Fulkerson some money, and he asked him what that was for, and he said for the bottle. That Fulkerson turned around to look for the girl, but she was gone. The men then said they were Federal officers and put Fulkerson under arrest. That Fulkerson had never seen the Miller woman before; did not know anything about the whiskey, nor have any interest in it, or have anything to do with it; never told Agent O'Hara that he had started Mrs. Nulph in business, nor to keep quiet, they were making too much noise; did not know a thing about the transaction, outside of what he had just stated; did not tell Agent O'Hara that Mrs. Nulph would fall for the thing; that he did not go back in the kitchen and tell the officer there was moonshine there; that while they were searching the house he was detained by Officer Kline right in the front room; that he had nothing to do with renting the apartment or operating it; never in trouble of any kind; before becoming a policeman had been engaged in ranching.

On cross-examination, defendant Fulkerson testified: repeated that he had lived in the apartment three months; had gone in there about the first of June; that he was patrolling a beat from 12 at noon until 8 at night, and was working at the Hippodrome from [31] quarter to nine until one or 1:15, depending upon how the crowd got out; that

(Testimony of Glen Fulkerson.)

Mr. Fisher is the man who runs the Hippodrome; that he rented the room at the apartment because he had to be close to make a change of his clothing, and could not go home; the cars stopped running at one o'clock. That there were several other tenants in the apartment; that he was renting from Mrs. Nulph, codefendant. Witness Fulkerson repeated that he did not know Mrs. Miller, and had never seen her before she handed him the bottle; did not know what was in the bottle, and neither did he look to see, nor had the officer that he handed it to.

Q. (By the COURT.) Was the bottle wrapped up; anything around it? A. No, sir.

Q. (By Mr. McKINNEY.) Did they hand you a $5.00-bill?

A. Yes, sir; they said, "Here, give this to the girl."

Q. Who were you talking to at that time?

A. O'Hara.

Q. You were talking to O'Hara? A. Yes, sir.

That Agent Kline took the money from his hand. He was standing by the front door, in the hall; that he had paid the telephone bill.

Q. Showing you Government's Exhibit 14 marked for identification, I will ask if you have seen that before? A. Yes, sir.

Q. What is it? A. A receipt.

Q. A receipt for what? A. The telephone.

Q. Did you pay for it? A. Yes, sir. [32]

(Testimony of Glen Fulkerson.)

Q. Showing you Government's Exhibit 13, I will ask you if you have seen that before?

A. Yes, sir.

Q. What is it? A. Another receipt.

Q. Did you pay that bill?

A. I presume so; I paid every one of them.

Q Did you ever pay any other bills up there?

A. No, sir.

Defendant Fulkerson testified that he kept those bills in a dresser drawer.

On redirect examination, defendant repeated that his brother, sister and wife were waiting out in front of the building in the car; the phone that was put in the premises was for his own convenience.

TESTIMONY OF JOHN VALSUANO, FOR DEFENDANT.

JOHN VALSUANO, called as a witness on behalf of the defendant Fulkerson, being first duly sworn, testified as follows:

That he had known the defendant Fulkerson for six or seven years; that he knew the reputation of the defendant for honesty and being a law-abiding citizen, and that his reputation was good.

Mr. TUCKER.—I have several more character witnesses who were to be here at 2:30, your Honor.

Mr. McKINNEY.—The Government will admit they will testify to his good character.

Mr. TUCKER.—Will you admit he was employed

(Testimony of Richard Burr.)

there by Mr. Fisher at the time he was arrested there at the Hippodrome?

Mr. McKINNEY.—Absolutely. [33]

Mr. TUCKER.—Mr. Hines, a real estate broker, will be here at 2:30, and the other men are on the election board.

Mr. McKINNEY.—The Government will admit they will all testify to his good character.

TESTIMONY OF RICHARD BURR, FOR DEFENDANT.

RICHARD BURR, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

That he had known Mr. Fulkerson for five or six years, and that his reputation for integrity and being a law-abiding citizen was good.

Mr. McKINNEY.—The Government will admit that anybody he brings in will testify to his good character.

Mr. TUCKER.—Three witnesses.

Mr. McKINNEY.—We will admit that the three will testify to that, your Honor.

This was substantially all the testimony and evidence offered in support of the defendant's case.

At this point, the defendant, through his counsel, moved the Court for an order directing a verdict of not guilty on count 1, and for an order directing a verdict of not guilty on count 2 and for an order directing the jury to return a verdict of not guilty on count 3.

(Testimony of Richard Burr.)

The COURT.—Motion denied.

Mr. TUCKER.—The Court will allow an exception on each one?

The COURT.—Yes. [34]

The Court then sustained the motion of Mr. Dore as to Count 2. And the Assistant District Attorney moved for a dismissal of the remaining two counts against Mrs. Nulph, which was granted by the Court.

Mr. TUCKER.—I renew my motion for a directed verdict in favor of the defendant Fulkerson on all three counts.

The COURT.—Denied.

Mr. TUCKER.—Exception.

The COURT.—Allowed.

Mr. McKINNEY.—(During opening argument.) Everybody in town knows the reputation of the Hippodrome.

Mr. TUCKER.—I take an exception to that remark as being prejudicial, and not based upon any evidence.

The COURT.—Note an exception.

Mr. TUCKER.—Ask the Court to instruct the jury not to pay any attention to the argument of counsel with reference to the reputation of the place, because there is not a syllable of evidence as to the reputation of the place.

The COURT.—Proceed with the argument.

Mr. TUCKER.—Allow me an exception; there is no evidence to that effect; and ask the Court to instruct the jury there is no evidence to that effect.

Mr. McKINNEY.—(During closing argument.) I submit he is guilty on all three of the counts, and should be punished.

Mr. TUCKER.—I object to counsel making any argument about any punishment; it is not any of his business.

(No ruling.) [35]

After the argument on behalf of the Government and on behalf of the defendant, the Court gave its instructions to the jury as follows:

INSTRUCTIONS OF COURT TO THE JURY.

The COURT (Orally).—The information in this case, Gentlemen of the jury, charges the defendants, Glen Fulkerson, Luella Nulph and Ruth Miller with violating the National Prohibition Act. Count 1 charges the possession unlawfully on the 10th day of September, 1923, of quantities of liquor, which is set out in that count, by the defendants. Count 2 charges, on the same day, the 10th of September, a sale of intoxicating liquor, containing the prohibited alcoholic content, and known as whiskey. Count 3 charges the defendants with maintaining a nuisance, by keeping, selling and bartering intoxicating liquor in the particulars described, contrary to law. The defendant, Ruth Miller, failed to appear; she has left the jurisdiction of the court, and her bail was forfeited this morning, and a bench-warrant was issued; when she is apprehended she will have to be tried separately; and the Court has indicated that it would sustain a motion made by the defendant, Luella Nulph, with relation to Count

2, and the Government has moved to dismiss Counts 1 and 3 as to her; so the Clerk is now directed to enter judgment in favor of the defendant, Luella Nulph, on all of the counts in the information. You are concerned only then with the guilt or innocence of the defendant, Glen Fulkerson. He has pleaded not guilty, that means he denies each and every count in the information. He is presumed innocent until he is proven guilty by the testimony which is presented. This presumption continues throughout the trial until you are convinced by the evidence of his guilt by that degree of proof. The burden is upon the Government to show he is guilty beyond every reasonable doubt, and this must be shown by testimony [36] which is direct and positive, presented on the part of the Government, or it may be likewise testimony on the part of the defendant.

In this case with relation to a part of the liquors charged in this information there is not much dispute. With relation to other liquor which has been admitted in evidence will be determined by you from all the testimony which is presented and by circumstances and facts which have relation to this issue.

You are instructed that evidence is of two kinds, direct and circumstantial. Direct evidence is produced by witnesses testifying directly of their own knowledge of the facts to be proven. Circumstantial evidence is proof of such facts and circumstances in a case from which the jury may infer other and connected facts, which usually and reasonably follow, according to the common experience of mankind. Circumstantial evidence is legal and com-

petent in criminal cases, and when it is of such a character as to exclude every other reasonable hypothesis than that the defendant is guilty, then it is entitled to the same weight as direct testimony. Circumstantial evidence, if any, should be considered by you in connection with all the other evidence before you, and if you do not believe, or have a reasonable doubt as to the defendant's guilt, then you should convict; but if you entertain a reasonable doubt with relation to the guilt, after considering all the evidence, which is presented, then you should return a verdict of not guilty. All the circumstances should be consistent with each other; consistent with the guilt of the defendant, and inconsistent with his innocence, and consistent with every other reasonable hypothesis except that of his guilt.

You, Gentlemen of the Jury, are the sole judges of all the facts in the case, and you are likewise the sole judges of the credibility of the witnesses. You are instructed in weighing the testimony of any of the witnesses who have testified before you, in [37] order to give it the credence it is entitled to, you should take into consideration the demeanor of the witness upon the witness-stand, the reasonableness of the story, the opportunity of the witness for knowing the things about which he has testified, and the interest, or lack of interest in the result of this trial, and from all this determine who did tell the truth, and then conclude with relation to the fact which has been established.

You are instructed that it is against the law for a person to have in his possession intoxicating liquor,

such as charged in this information, containing the prohibited alcoholic content, and being fit for beverage purposes.

In determining then what the fact is, you will consider all the circumstances that have been detailed herein; take the room or place where the liquors were found as shown by the testimony here; take the relation of the defendant to these premises; his conduct when he was in the room admitted by him, and in these premises; the testimony that he gave upon the stand; the testimony of the witnesses on the part of the Government, and from them you must determine what his relation is. If his relation was that of proprietor in a broad sense; if the relation was as testified to by some of the witnesses on the part of the Government, that he was helping this woman out, who was a widow and has three or four children, and if you believe from all the circumstances and the testimony developed here that the defendant was the real proprietor, and in possession of the premises, and if these liquors in the kitchen were really his possession, if he was the directing mind,—was the controlling influence and force with relation to the premises and of these liquors, then you would find he was in possession of it all.

Now, then, what is the testimony on the part of the Government? The witnesses on the part of the Government say, that [38] when they went in this Miller woman brought them in some drink, and then they asked for a flask, and she went out and said, "Wait a minute"; went out with the partially filled

flask, and then came back with the defendant; the defendant said "That is all right, $5.00 for the bottle and for the two drinks," and gave the bottle to Mr. O'Hara and took the $5.00.

Now the defendant says that he was in the hall, that he did have his coat off, as the officers of the Government say he did; that he did come into the room with the bottle of whiskey in his hand; that he did deliver to one of these men the bottle and did receive $5.00. Now that far the testimony harmonizes. Now he said that the woman gave it to him; he did not know what it was; told him to give it to the man, and he did it; then the officers came in and they found the $5.00 in his hand, just as the officers testified they did. Now he was asked whether the bottle was wrapped up, he said no. He said he did not know what was in the bottle. It is for you to determine the fact. Now if he was in the hall, and if this woman gave him the bottle and told him to deliver it to these men, and he did not know what was in the bottle, and gave it to the men, without knowing what was in the bottle, and got the $5.00 without knowing what was in the bottle, or what he was doing, if you believe that, then he is not guilty, because he didn't know what was in the bottle. If you believe that a man could be on the police force in Seattle for three years and have a flask like that passed to him, with that color of contents,—a man on the police force, and not knowing it was whiskey or prohibited spirits provided by the Volstead law and the Prohibition amendment, then you must conclude that way, because it is for you

to determine what the fact is. Now, I don't want you to conclude from any opinion you may think I have of the facts. I don't believe a word of it, myself; I believe he knew what was in the bottle; but [39] that must not control you; you must find the fact. And while I have a right to tell you what I think about the facts, you must not be controlled by what I think about them; you must weigh all the testimony and all the circumstances, and determine what the truth is. If you have a reasonable doubt as to the facts, then you should return a verdict of not guilty. But if you are convinced beyond a reasonable doubt that he did know what was in the bottle, then it is your duty to return a verdict of guilty on the first count, and of guilty on the second count, because the possession of that one bottle would be sufficient to violate the law, as charged in this information, of possession and sale.

Now as to the next count, the count of the common nuisance, this is what the law says: "Any rooming house or building where intoxicating liquor is kept, in violation of the National Prohibition Act, is declared to be a common nuisance." Now if he was in possession of this liquor in the kitchen, if you believe he was in possession of that, and believe it was kept there, then you must find it was in violation of the National Prohibition Act, because he had no right to keep it there; and then if you find that this annoyed such part of the public that came in contact with it, and was not authorized by law under the National Prohibition Act, such would be a nuisance, and if you believe that beyond a reason-

able doubt, then it would be your duty to return a verdict of guilty upon count 3. But if you have a reasonable doubt upon that, then you will return a verdict of not guilty.

Now in these instructions, Gentlemen of the Jury, I have related and referred to the facts or testimony, and the circumstances with a view of illustrating or demonstrating some proposition of law which has its application to the facts, and have expressed some personal opinion, but I do not want you to be controlled by it in [40] any sense, but I want you to conclude upon the evidence itself, so that the law may be administered fairly, if the law has been violated that it may be enforced, and the parties who violate it be punished. When courts cease to function properly then God have mercy upon the people of the United States. Law is a rule of civil conduct prescribed by a superior power, and persons must regulate their conduct with relation to that law. It is a rule by which people shall live, and when they violate that rule why then they must be punished; that is the only way we can have government; and when courts and juries won't function it will only be a short step to a condition of anarchy.

If you believe that the defendant went on the stand and perjured himself with a view of escaping a penalty, you will so conclude. Pass upon this fairly. It is your duty as twelve fair-minded men to give the defendant a square deal; he is entitled to it; the Government is entitled to a square deal, give it a fair and a square deal in this case, and if you have

a reasonable doubt upon all the circumstances developed here, you will resolve it in favor of the defendant; if you are convinced beyond a reasonable doubt, then return a verdict of guilty in this case, as your conscience dictates, and the right and truth is.

You are instructed a reasonable doubt for a trial juror is such a doubt as the term implies. It is such a doubt as a man of ordinary prudence, sensibility and decision in determining an issue of like concern to himself as that before the jury to the defendant, would make him pause or hesitate in arriving at his conclusion. It is a doubt which is created by the want of evidence, or may be by the evidence itself. It is not speculative, imaginary or conjectural doubt; a juror is satisfied beyond a reasonable doubt when he is convinced to a moral certainty of the guilt of the party charged. [41] I believe I have covered the case. Any exceptions?

Mr. TUCKER.—I want to take an exception, your Honor, to that portion of your Honor's instructions to the jury wherein, commenting upon the evidence of the defendant, you said you did not believe it. I take an exception to it as being an infringement upon the rights of the defendant to have his case tried by a jury, and to pass upon the facts.

The COURT.—Exception noted.

Mr. TUCKER.—I further take an exception to it upon the ground it is not your province to express your opinion as to what you believe about the evidence to the jury.

The COURT.—Yes, let the exception be noted.

Mr. TUCKER.—I also take an exception to your Honor's instructions to the jury giving a definition of the term as to what a common nuisance is under the Volstead Act, for the reason,—I may be mistaken with reference to my judgment of the law,—but your Honor did not correctly interpret the law as to the common nuisance as created by that act; that my opinion as to the law is, it is not a common nuisance to have liquor in one's possession, in one's own premises, for one's own use under that act. Your interpretation to the jury of the act prohibits that liberty extended to the defendant under the act.

The COURT.—In that connection I perhaps might say, while I do not believe the exception is well taken, I will say, that the only exception when a person may have liquor in his own premises is when he has it pursuant to the provisions of the law. One of those provisions is that he must have had it at the time that the act took effect. and when it is shown that he had the possession of it, the burden is upon him to show that he came by it lawfully. In this case he admitted he had possession of this flask, and there is no testimony here that he came by it lawfully, and the burden is upon him to show [42] that he came by it lawfully.

Mr. TUCKER.—The Court will allow me an exception to the last instruction?

The COURT.—Yes.

Mr. TUCKER.—I contend it is not a correct interpretation of the law.

The COURT.—Yes.

Mr. TUCKER.—I also take exception to that portion of your Honor's instructions to the jury where-

in you dilated upon the necessity for the enforcement of the criminal law, and the necessity for the punishment of those charged with crime, who might be convicted.

The COURT.—Yes, note that exception.

Mr. TUCKER.—As being an infringement upon the right of the defendant to have a fair trial by a jury.

The COURT.—Yes, let the exceptions be noted.

The jury then retired, and after deliberation returned a verdict of guilty as charged.

Thereafter and within the time allowed by law and before sentence was imposed, defendant moved for a new trial and at the same time also moved in arrest of judgment. Thereupon the Court denied each of said motions. The Government moved for judgment and sentence and the Court then entered judgment and sentence as follows, viz: That defendant pay a fine of $500.00, under count 1, and serve six months in the King County Jail, under counts 2 and 3, said two periods of six months to run concurrently.

And now, in furtherance of justice and that right may be done the defendant, and inasmuch as the foregoing facts do not appear fully of record, the defendant prays that this, his bill of exceptions may be settled, allowed, signed and sealed by the Court, and made a [43] part of the record herein.

EDWARD H. CHAVELLE,
TUCKER, HYLAND & ELVIDGE,
Attorneys for Defendant Glenn Fulkerson.
315 Lyon Building,
Seattle, Washington.

Due service of copy of within bill of exceptions admitted, and receipt of copy thereof acknowledged this —— day of April, 1924.

_____,

United States Attorney. [44]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLEN FULKERSON et al.,

Defendants.

ORDER SETTLING BILL OF EXCEPTIONS.

Now, on the 9th day of June, the above cause came on for hearing on the application of the defendant to settle the bill of exceptions in this cause, counsel for both parties appearing; and it appearing to the Court that said bill of exceptions contains all of the material facts occurring upon the trial of the cause, together with the exceptions thereto and all of the material matters and things occurring upon the trial except the exhibits introduced in evidence, which are hereby made a part of said bill of exceptions and the Court being duly advised, it is by the Court

ORDERED, that said bill of exceptions be and it is hereby settled as a true bill of exceptions in said cause, which contains all of the material matters, facts, things and exceptions thereto occurring upon the trial of said cause, and not of record heretofore, and the same is hereby certified accordingly by the undersigned Judge of this court, who presided at the trial of said cause, as a true, full and correct bill of exceptions and the Clerk of the court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

JEREMIAH NETERER,
U. S. District Judge.

Received copy of bill of exceptions this 24th day of April, 1924.

THOS. P. REVELLE,
M. M.,
U. S. Attorney.

[Endorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division. Apr. 24, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jun. 9, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [45]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLEN FULKERSON,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare copies of the following documents and papers in the above cause, and forward them under your certificate and seal to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, as a transcript of the record in said cause, viz.:

1. Information.
2. Arraignment.
3. Plea of not guilty.
4. Record of days trial and journal entry of order empaneling jury.
5. Verdict of guilty.
6. Motion in arrest of judgment.
7. Motion for new trial.
8. Order denying motion for new trial and in arrest of judgment.
9. Sentence and judgment of Court.
10. Petition for writ of error.

11. Assignment of errors.
12. Writ of error with order attached.
13. Citation in error.
14. Bond on writ of error.
15. Order extending time for serving and filing record.
16. Order extending time for settling bill of exceptions.
17. Bill of exceptions, with allowance and endorsement thereon.
18. Order settling and allowing bill of exceptions.
19. Praecipe for appellate record.
20. Clerk's certificate.

Dated at Seattle, Washington, June 14, 1924.

EDWARD H. CHAVELLE,
Attorney for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 16, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [46]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GLEN FULKERSON et al.,
Defendants.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 46, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true, and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [47]

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return, 118 folios at 15¢	$17.70
Certificate of Clerk to transcript of record, 4 folios at 15¢	60
Seal to said certificate	20

I hereby certify that the above cost for preparing and certifying record, amounting to $18.50 has been paid to me by attorney for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, this 23d day of July, 1924.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western District of Washington. [48]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7934.

GLEN FULKERSON,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

WRIT OF ERROR.

United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States of America: To the Honorable Judge of the District Court of the United States for the Western District of Washington, Northern Division:

Because in the record and proceedings, as also in

the rendition of judgment, of a plea which is in the said District Court before you, between the United States of America as plaintiff and Glen Fulkerson as defendant, a manifest error hath happened, to the great damage of said defendant, Glen Fulkerson, as by his complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, within thirty days from the date hereof, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done. [49]

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 15th day of April, 1924.

[Seal] F. M. HARSHBERGER,
Clerk of the United States District Court for the Western District of Washington.

Due service of within writ of error admitted and receipt of copy thereof acknowledged this 15th day of April, 1924.

THOS. P. REVELLE,
M.,
U. S. Attorney. [50]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 15, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7934.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUY FULKERSON,

Defendant.

CITATION ON WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to the United States of America, and to Thomas P. Revelle, United States Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, in the State of California, within thirty days from date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein the said *Guy* Fulkerson

is plaintiff in error, and the United States of America is defendant in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the party in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 15th day of April, 1924.

[Seal] JEREMIAH NETERER,
United States District Judge.

Received copy this 15th day of April, 1924.

THOS. P. REVELLE,
A. M.,
U. S. Attorney. [51]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 15, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: No. 4312. United States Circuit Court of Appeals for the Ninth Circuit. Glen Fulkerson, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Received July 25, 1924.

F. D. MONCKTON,
Clerk.

Filed August 20, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

GLEN FULKERSON,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

ORDER UNDER SUBDIVISION I OF RULE 16 ENLARGING TIME TO AND INCLUDING JULY 28, 1924, TO FILE RECORD AND DOCKET CAUSE.

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED, by and between Thomas P. Revelle, Esquire, United States Attorney, and C. T. McKinney, Assistant United States Attorney, and Edward H. Chavelle, attorney for the plaintiff in error, that the time for filing the record in the above-entitled case be, and it is hereby extended to the 28th day of July, 1924.

Dated at Seattle, Washington, July 22d, 1924.

C. T. McKINNEY,
Asst. United States Attorney.

————————,
Assistant United States Attorney.
EDWARD H. CHAVELLE,
Attorney for Plaintiff in Error.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 22, 1924. F. M. Harshberger, Clerk. By ————, Deputy.

No. 4312. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including July 27, 1924, to File Record and Docket Cause. Filed Jul. 25, 1924. F. D. Monckton, Clerk. Refiled Aug. 20, 1924. F. D. Monckton, Clerk.

No. 4312

In The United States
Circuit Court of Appeals
For the Ninth Circuit

GLEN FULKERSON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF GLEN FULKERSON
Plaintiff in Error

EDWARD H. CHAVELLE,
Attorney for Plaintiff in Error

315-321 Lyon Building
Seattle, Washington.

Gateway Printing Co.

In The United States
Circuit Court of Appeals
For the Ninth Circuit

GLEN FULKERSON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF GLEN FULKERSON
Plaintiff in Error

STATEMENT OF THE CASE

Plaintiff in Error was informed against on the 20th day of September, 1923, for a violation of the National Prohibition Act, in three counts, namely, for the possession and sale of intoxicating liquor,

and maintaining and conducting a common nuisance, contrary to law. To this, the plaintiff in error entered a plea of not guilty, and thereafter, on the 26th day of February, 1924, a trial was had in the District Court, which resulted in a verdict of guilty on all counts.

The plaintiff in error then filed a motion for new trial, which was overruled, and the plaintiff in error was sentenced to six months in jail on each of counts two and three of said Information,to run concurrently, and to pay a fine of $500. on Count I.

Plaintiff in error sued out his writ of error and now presents the same, upon the grounds of error preserved in the record.

The facts shown by the Bill are as follows: While a policeman of the City of Seattle, having been on the force for about three and one-half years, the plaintiff in error outside of his occupation as a patrolman, was working as a doorman at the Hippodrome, and had been so employed for some time last pass. He worked from 8:30 until one or 1:15 o'clock in the evening for the Hippodrome; was employed as a policeman by the City from the hours of 12 noon until 8 o'clock in the evening; that he rented a room at the premises described at 515 Seneca Street, being one of the rooms in the Apartment subject to this controversy; that he had his room for the same period of time that he had been a doorman at the Hippodrome, about three

months, having rented the room from Mrs. Nulph, a co-defendant in the case, and paid her $15.00 a month for the same; that on the first of September, 1923, his beat was changed to Washington Street, and he started working nights, instead of days, and that he had given up the room, but had not had an opportunity to take his things away, and he came to the premises on the 10th day of September, 1923, the day he was arrested, for the purpose of getting his clothes, because he had maintained the room and changed there when he went off duty as a patrolman, to his uniform as a doorman at the Hippodrome. He left his wife and his brother and sister in the car outside the building waiting for him, while he went in to get his things. The officer contended they bought some drinks from one Ruth Miller, a co-defendant, and that she had a flask of whiskey in a pocket of her dress. They asked her how much it would be for the bottle, and she said they were $5.00. One of the agents then said that he offered to give her $5.00 for the two drinks that they had had, and what was left in the bottle, and she went outside the door and after a few minutes the defendant, Fulkerson, came in and said it was all right for the $5.00 and passed the bottle to the Prohibition Agents, and received the $5.00 in payment. Fulkerson testified that he had never seen the Miller woman before, and did not have any interest in the whiskey, and did not have anything to do with it. (Tr. pp. 29-43.)

ASSIGNMENTS OF ERROR

I

The plaintiff in error, in connection with his petition for writ of error, makes the following assignments of error, which he avers occurred upon the trial of the case, to-wit:

1. The lower court erred in denying the defendant's motion for new trial, particularly upon the ground that the defendant, Glen Fulkerson, was precluded from having a fair and impartial trial by reason of the comments of the trial judge on the evidence adversely to the said defendant, and prejudicial.

2. The court erred in its instructions to the jury, as follows:

> "If you believe that a man could be on the police force in Seattle for three years and have a flask like that passed to him, with that color of contents,—a man on the police force, and not knowing it was whiskey or prohibited spirits provided by the Volstead law and the Prohibition amendment, then you must conclude that way, because it is for you to determine what the fact is. Now, I don't want you to conclude from any opinion you may think I have of the facts. I don't believe a word of it, myself; I believe he knew what was in the bottle."

> "*When courts cease to function properly, then God have mercy upon the people of the United States. Law is a rule of civil conduct prescribed by a superior power, and persons must regulate their conduct with relation to that law. It is a rule by which people shall live, and*

when they violate that rule why then they must be punished; that is the only way we can have government; and when courts and juries won't function, it will only be a short step to a condition of anarchy.

"If you believe that the defendant went on the stand and perjured himself with a view of escaping a penalty, you will so conclude. . . . If you are convinced beyond a reasonable doubt, then return a verdict of guilty in this case, as your conscience dictates, and the right and truth is."

MR. TUCKER: I want to take an exception, Your Honor, to that portion of Your Honor's instructions to the jury wherein, commenting upon the evidence of the defendant, you said you did not believe it. I take an exception to it as being an infringement upon the rights of the defendant to have his case tried by a jury and to pass upon the facts.

THE COURT: Exception noted.

MR. TUCKER: I further take an exception to it upon the ground it is not your province to express your opinion as to what you believe about the evidence to the jury.

THE COURT: Yes, let the exception be noted (Tr. pp. 47-50).

MR. TUCKER: I also take exception to that portion of your Honor's instructions to the jury wherein you dilated upon the necessity for the enforcement of the criminal law, and the necessity for

the punishment of those charged with crime, who might be convicted.

THE COURT: Yes, note that exception.

MR. TUCKER: As being an infringement upon the right of the defendant to have a fair trial by a jury.

THE COURT: Yes, let the exceptions be noted. (Tr. pp. 51-52).

ARGUMENT

The assignments present these questions:

1. Was the defendant precluded from having a fair and impartial trial, by reason of the comments of the trial judge on the evidence adversely to the said defendant and prejudicial to him?

2. Did the court in threatening the jury with the result of a verdict of not guilty, invade the province of the jury, and so prejudice the jury against the defendant as to not afford him a fair trial, when the matters in comment had nothing whatsoever to do with the issues, or applicable to the case at bar?

POINT I

Under this caption, we will discuss these two questions.

The entire instruction of the court did not deal with any fact that was favorable to the defendant,

but only with those facts that were adverse to him. The defendant's explanation as to his presence in the premises, which was perfectly lawful, was not even suggested to the jury in his argument to them, but instead, the court, whose duty it was to instruct the jury on the law, expressed continuously throughout his instructions, his opinion of the defendant's guilt, and made to the jury, by an elimination of the good, and the expounding of the bad, what could only conclusively establish the guilt of the defendant. The court said, in remarking upon whether the defendant knew what was in the bottle:

> "If you believe that a man could be on the police force in Seattle for three years and have a flask like that passed to him, with that color of contents,—a man on the police force, and not knowing it was whiskey or prohibited spirits provided by the Volstead law and the Prohibition amendment, then you must conclude that way, because it is for you to determine what the fact is. Now, I don't want you to conclude from any opinion you may think I have of the facts. *I don't believe a word of it myself; I believe he knew what was in the bottle.* . . ." (Tr. pp. 47-48).

And the court, continuing:

> "I want you to conclude upon the evidence itself, so that the law may be administered fairly, if the law has been violated that it may be enforced, and the parties who violate it be punished. *When courts cease to function properly then God have mercy upon the people of the United States.* Law is a rule of civil conduct prescribed by a superior power, and persons must regulate their con-

duct with relation to that law. It is a rule by which people shall live, and when they violate that rule why then they must be punished; that is the only way we can have government; and when courts and juries won't function, it will only be a short step to a condition of anarchy.

"If you believe that the defendant went on the stand and perjured himself with a view of escaping a penalty, you will so conclude. Pass upon this fairly. . . ." (Tr. p. 49).

The court continuing:

'If you are convinced beyond a reasonable doubt, then return a verdict of guilty in this case, as your conscience dictates, *and the right and truth is.*" (Tr. p. 50).

The jury promptly returned a verdict of guilty on all counts, which after this charge, was all that they could be expected to do. There was no weighing of the evidence. The court had painted a picture so black, that the jury had a right to believe as the court said, that "it was only a short step to a condition of anarchy" if they did not properly function, and he had told them how to function. The weight the jury gives to what the court says, we all appreciate. It should be so. The Court, a man of learning, and experience, educated in the law, the jurors lean with great weight on his very syllable, but there was no question in this case of the courts ceasing to function or reason for God to have mercy upon the people of the United States, and it was prejudicial to the defendant for the Court to state that it was only a "short step to a

condition of anarchy" when the courts and juries cease to function, and that "law is a rule of civil conduct prescribed by a superior power, and persons must regulate their conduct with relation to that law. It is a rule by which people shall live, and when they violate that rule, why then they must be punished; that is the only way we can have government."

Under these circumstances, were the rights of the defendant infringed, to have the case tried by a jury, who were to pass on the facts? Could the Court, by anything he said regarding the province of the jury as being sole judges of the facts, have cured the influence he had wielded by the force of his charge?

In the State Court of this Circuit the rule prevails that the court cannot express an opinion, and under these circumstances an expression of an opinion from a Federal Judge in this Circuit, necessarily carries more weight than would an expression of a Federal Judge in a circuit where a different rule prevails in the State Court. If the layman sits upon the jury, not educated in the law, relying upon the court to instruct him as to the law, prejudiced against the defendant by the charge of the court as to the consequences of his duty to function as a juror, being only a short step to a condition of anarchy, and that when "courts cease to function properly then God have mercy upon the people of the United States," in conjunction with the expresison of the court that he did not believe

a word of it, referring to the testimony of the defendant, in connection with the charge of the court that 'if you are convinced beyond a reasonable doubt, then return a verdict of guilty in this case, *as your conscience dictates, and the right and truth is,*" there could be but one impression that the jury could get from the charge of the court, and that is that the jury would cease to function if they did not find the defendant guilty, and believing the court that they must find him guilty, there was nothing else for the jury to do under these instructions. The court took away from the jury their right to function by his comments not only upon the guilt of the defendant, but the consequences of their verdict. There was nothing he could then say about the jury being the sole judges of the facts, which would cure what he had already said as to how they should conclude these facts. This precluded the defendant from having a fair and impartial trial, and no where in the authorities have we found a charge that so completely invades the province of the jury.

If the jury in this case were twelve fair and impartial men, there is but one conclusion at which they could arrive after listening to this charge, and that is the guilt of the defendant. The court, without making a fair statement of the evidence, or any statement of the defendant's defense, remarks only upon that evidence that could be adverse to him, emphasizing it to the jury with his comment as to his conclusion as to the guilt of the defendant, and

the consequences of their act if they cease to function, which precluded entirely a fair and impartial trial, and prevented the jury from properly functioning, and was greatly prejudicial to the defendant.

The following cases indicate how far the courts have gone in the matter of commenting upon the facts:

Mullen vs. U. S., 106 Fed. 892.
Rudd vs. U. S., 173 Fed. 912.
Foster vs. U. S., 188 Fed. 308.
Oppenheim vs. U. S., 241 Fed. 625.
Hicks vs. U. S., 150 U. S. 442 (450).
Sparf vs. U. S., 156 U. S., 51.
Allison vs. U. S., 160 U. S. 203.
Starr vs. U. S., 153 U. S. 614 (624).
Graham vs. U. S. 251 U. S. 474.
Smith vs. U. S. 161 U. S. 85.

In *Mullen vs. U. S.*, 106 Federal 892, the Court quotes with approval, from *Starr vs. U. S.*, 153 U. S. 616, referring to the language of the Supreme Court of Pennsylvania in *Burke vs. Maxwell*, Adm., 81 Pa. St. 153, as follows:

> "When there is sufficient evidence upon a given point to go to the jury, it is the duty of the judge to submit it clearly and impartially. And, if the expression of an opinion upon such evidence becomes a matter of duty under the circumstance of the particular case great care

> should be exercised that such expression should be so given as not to mislead, and especially that it should not be one-sided. The evidence, if stated at all, should be stated accurately as well that which makes in favor of a party as that which makes against him. Deductions and theories not warranted by the evidence should be studiously avoided. They can hardly fail to mislead the jury and work injustice."

The Chief Justice adds:

> "It is obvious that under any system of jury trials the influence of the trial judge upon the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." *Hicks vs. U. S.,* 150 U. S. 442.

The indignation of the learned trial judge in this case was perhaps provoked by the defendant being a police officer, but the comments were unwarranted and prejudicial to the accused in a high degree. *Rudd vs. U. S.,* 173 Fed. 912.

The court said the view was undoubtedly impressed upon the jury that "no one with the slightest degree of intelligence above insanity could believe the machine was practicable." The court then remarked that "Whether conduct which is the subject of a criminal charge results from a credulous self-deception, or, on the other hand, evinces a design to defraud the public, is a question for the determination of the jury, and it is none the less so, though the truth of the matter may be clear to most intelligent minds. The remarks of

the court were calculated to impose upon them a constraint that interfered with an independent consideration of his defense."

Quoting with approval Chief Justice Fuller, in *Starr vs. United States*, 153 U. S. 614, the court continued:

> "True the court afterwards withdrew the language and said it was a question for the jury; but it is doubtful the damage was repaired, and when that is the case the just remedy is a new trial. A mere withdrawal of words, and a direction to the jury that the question is for them, is not always sufficient. The effect of what is said may remain. . . . But his comments upon the facts should be judicial and dispassionate, and so carefully guarded that the jurors, who are the triers of them, may be left free to exercise their independent judgment."

But the Court here left no room for doubt in the minds of the jury, in dissuading them from considering the testimony and lending such weight to it as it was entitled, but by his comment upon the guilt of the defendant, with the consequence of a contrary verdict, left no room for the exercise of any judgment on the part of the jury.

Listening to the court's charge, independent of the record of the testimony, there could be but a conclusion of guilt of the defendant to which a fair-minded jury could come.

In *Foster vs. U. S.*, 188 Fed. 308, the court said:

"It should be borne in mind that the judges of the various state courts in this circuit are not permitted to express an opinion as to the guilt of a defendant. Our people have become accustomed to this system, and as a consequence, jurors attach great importance to any expression coming from the presiding judge, feeling as they do, that it is only in exceptional cases that he expresses an opinion as to any matter that may be submitted to them, and when he does they feel that they are bound by the same. Under these circumstances, an expression of opinion from a federal judge in this circuit necessarily carries more weight than would the opinion of a federal judge in a circuit where a different rule prevails in the State Courts. While the learned judge who heard this case below, employed language that clearly informed the jury that they were not bound by any expression that he may have made, nevertheless, the circumstances surrounding the trial of this case are such as to impel us to the conclusion that the jury was influenced in a large measure by the opinion of the court. It may be that in many instances jurors refuse to find the defendants guilty, notwithstanding the fact that the evidence is such as to justify them in so doing, and thus permit those who are guilty to escape punishment. While this is to be deplored, yet the rule which leaves all questions of fact to be passed upon by the jury, should never be relaxed or modified, if the rights and liberties of the citizen are to be preserved."

In Oppenheim vs U. S., 241 Fed. 625, "the defendants urge that the charge of the Court was so one sided as to amount to a summing up on behalf of the government. Examination of the charge

constrains us to find that this criticism is just. Although no objection or exception was taken to it, we may consider it as a plain error under Rule 11 of this Court. The words of the judge's charge are the last words and the most weighty words that are dropped into the minds of the jury before they come to their verdict, and it is of the utmost importance that they be calm and impartial."

The proposition that the wise and human provision of the law that a person accused is a competent witness, should not be defeated by hostile intimations of the trial judge, is reiterated by the opinion of Chief Justice Fuller, in *Allison vs. U. S.,* 160, U. S. 203; *Smith vs. U. S.,* 161 U. S., 85 and *Starr vs. U. S.,* 153 U. S. 614 (624).

The court came to the same conclusion as to the rights of the defendant having been invaded and the jury persuaded by the comments of the trial court, both decisions being in point.

The virtue of the instructions of the Court was at best a summing up for the government, of evidence adverse to the defendant, and coupled with his implication that he did not believe a word of it, referring to that part of the testimony of the defendant, with the emphasis the trial judge placed upon the consequences of the jury's verdict, left

to the jury but one course to pursue, or otherwise be subjected to ridicule.

The instructions were clearly prejudicial error, as laid down by the cases cited, anl it is upon this ground that the case should be reversed and returned for the manifestly prejudicial error of the record and the defendant afforded a trial by jury.

Respectfully submitted,

EDWARD H. CHAVELLE,

Attorney for Plaintiff in Error.

United States Circuit Court of Appeals

For the Ninth Circuit

GLEN FULKERSON, Plaintiff in Error

vs.

UNITED STATES OF AMERICA,
Defendant in Error

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Honorable Jeremiah Neterer, Judge

Brief of the United States

THOS. P. REVELLE
United States Attorney

C. T. McKINNEY
Assistant United States Attorney

United States Circuit Court of Appeals

For the Ninth Circuit

GLEN FULKERSON, Plaintiff in Error

vs.

UNITED STATES OF AMERICA, Defendant in Error

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

Honorable Jeremiah Neterer, Judge

Brief of the United States

STATEMENT OF THE CASE

The testimony shows that certain government agents visited the premises mentioned. Upon going in the hall they were met by a woman named Miller.

She invited them in and they asked for a drink of Scotch and a drink of gin. The gin was brought in a glass and the Scotch was brought in a bottle. They were served and one of the agents asked the defendant Miller what she would take for the bottle, and told her that they would give her five dollars for what was left in the bottle and the drink they had consumed. She told them she did not know but would find out. She left the room, and in a moment the defendant Fulkerson came into the room and said "Five is all right," handing them the bottle and taking the five-dollar bill. The defendant Miller did not return, but she was found in an adjoining room with a stranger after Fulkerson had been arrested. He admitted the five-dollar bill was taken from his hand. Fulkerson testified, on cross-examination, that he paid for the phone bill. Counsel for the government showed him telephone receipts for the months during the time he said he was there, and he admitted that he paid them, and then a bill dated two months before the date he said he was there was showed him and he said he paid it, the date going unnoticed by him. He denied that he had anything to do with the liquor, when the agents testified that had his coat off, and his gun and handcuffs and various articles of clothing in the

room where the phone was located, which he said he paid for. There was no other phone in the building. The defendant Miller absconded, and the defendant Nulph was dismissed from the action.

The common law rule is that judges may comment upon the facts in a jury trial and may express their opinion in referring to the facts provided the jury is made to understand that they are not bound by such opinion. This has been the law in the federal court since 1790. It is entirely proper and in keeping with the theory of a jury trial, the true theory being that a judge and jury should cooperate or work together in the trial of a case. The judge's experience enables him to assist the jury by explaining the testimony and discussing the theories of both sides of the case with the jury, helping in every way to condense and clearly define the issues. His opinion, if any is expressed, is not, under the law, binding, and should not be, but is merely expressed to help them in coming to a correct conclusion.

In his instructions to the jury the court said:

"If you believe that a man could be on the police force in Seattle for three years and have a flask like that passed to him, with that color of contents, a man on the police force, and not knowing it was whiskey or prohibited spirits provided by the Vol-

stead law and the prohibition amendment, then you must conclude that way, because *it is for you to determine what the fact is. Now, I don't want you to conclude from any opinion you may think I have of the facts. I don't believe a word of it myself; I believe he knew what was in the bottle; but that must not control you; you must find the fact. And while I have the right to tell you what I think about the facts, you must not be controlled by what I think about them; you must weigh all the testimony and all the circumstances and determine what the truth is. If you have a reasonable doubt as to the facts then you should return a verdict of not guilty.*"

It is well understood that a judge should not in any way interfere with the conscientious judgment of a juryman or else the constitutional provision guaranteed a trial by jury would be abrogated.

A number of states in the union, approximately thirteen, desired to change the common law by statute and the tendency has been to restrict them in various ways in commenting upon the evidence, as in the case of *Wastel vs. Montana Union R. Company,* 17 Montana 21e, where the court held it was error under the Montana statutes for the judge to call to the attention of the jury three witnesses by name.

In the case of *Cook vs. State,* 11 Georgia 53, 57, Judge Nisbet says in commenting upon this change:

"It is to be feared in these days of reform, that the judges will be so strictly laced as to lose all power of vigorous and healthful action. I have but little fear of judicial power in Georgia so aggrandizing itself as to endanger any of the powers of other departments of the government, or to endanger the life and liberty of citizens, or to deprive the jury of their appropriate functions. The danger rather to be dreaded is making the judges men of straw, and thus stripping the courts of popular reverence, and annihilating the popular estimate of the power and sanctity of the law."

Mr. Justice Hughes in delivering an address before the New York State Bar Association in January, 1916, said:

"The other tendency of which I have spoken is occasionally observed in legislation which denies to judges the authority which would seem to be needed for the efficient discharge of judicial duty. Thus, in some jurisdictions the freedom of the judge in instructing the jury is very considerably curtailed in a manner which betrays a regrettable distrust. . . . . There can be no respect for the law without competent administration, and there can be no competent administration without adequate power. We shall never rise to our opportunities in this country and secure a proper discharge of the public business until we get over our dislike of experts; and the difficulties in the way of needed improvements in the administration of justice will not be overcome by

tying the hands of those most competent to deal with them."

An abstract brief presented before the house of representatives on behalf of the American Bar Association opposing house bill 9354, pep. 284, contained the following paragraph:

"Probably the reason why this proposed rule was introduced and followed in *many courts* in America was because of a certain excessive tenderness for the position of the defendant in a criminal case, which we are learning to find was *judicious and unwise.* We are getting to realize the importance of the ancient common-law rule that it is in the interest of the public that the guilty man should be punished. *Judex damnatur, com nocens absolvitur.*

"We have pointed out that a great deal of what discontent there is with the administration of justice, arises from the failure to convict or punish. Lynching is the protest of the natural man against what he thinks is a failure of justice. It is an evil thing, undoubtedly, but still we can understand how a community sometimes does feel. We do not justify it, but still it is a fact that we must consider. The way to prevent that is to insure on the one side reasonable protection to the criminal, but on the other to make him feel that 'there is a God in Israel,' that there is justice in the law, and if he is the guilty man he is going to be punished."

There are numerous cases in the federal decisions upon this point and it is only necessary to cite a

few to show that the instructions of the lower court was well within the bounds of the rule in the federal court.

In *Post vs. U. S.*, 135 Fed. 11, the court said:

"If it (testimony) be of a kind that clearly taxes the credulity of the judge he can say so or if he totally disbelieves it he may announce the fact, leaving the jury free to believe it or not."

It is plain to be seen that the testimony of Fulkerson would tax the credulity of any judge.

In the case of *Dillon vs. U. S.*, 279 Fed. 642, 2nd C. C. C. A., the lower court instructs the jury as follows:

"Now you have heard this case. The court's opinion is that the defendant is guilty of the crime charged. In a federal court the court may inform the jury what his opinion is of the guilt or innocence of the defendant, but I want you to understand the question of his guilt or innocence is solely for the jury to decide. It is not for the court. The court has no part in deciding the guilt or innocence of the defendant, but the court may, if it seems desirable, inform the jury of his opinion. Now, gentlemen, you will take this case. You have a duty, a public duty, to perform, to decide this case upon your oaths and your responsibility; to decide on your conscience; to decide whether or not this man had whiskey unlawfully in his possession."

The circuit court in commenting upon this instruction, said:

". . . . . But whatever the rule may be in the state courts it is a well established law *which this court has no right or inclination to depart from*, that in the federal court the trial judge is entitled to express his opinion upon the facts and the guilt or innocence of the accused provided the jury is given unequivocally to understand that it is not bound by the expressed opinion of the judge."

In *Horning vs. District of Columbia*, 254 U. S. 135, the supreme court sustains the following instruction:

"In conclusion I will say to you that a failure by you to bring in a verdict in this case can arise only from a wilful and flagrant disregard of the evidence and the law as I have given it to you, and a violation of your obligation as jurors . . . . . of course, gentlemen of the jury, I cannot tell you in so many words to find the defendant guilty but what I say amounts to that."

In the case of *Savage vs. U. S.*, 270 Fed. 21, the court said that, as to four transactions which were named and described, there could not be any doubt that a fraud was perpetrated, but left it to the jury to find who had perpetrated the frauds. The court further said that it was of the opinion that the defendant was guilty on all counts but four and

refused to express an opinion as to the defendant's guilt as to those four. The court states repeatedly that this was a mere expression of its opinion, and that the jury were not bound by it and that it was the jury's duty to follow its own judgment, and that if the jury were of a contrary opinion, it was its duty to disregard the court's opinion.

In the case of *U. S. vs. Morse*, 255 Fed. 682, the lower court instructed the jury as follows:

"You are the sole judges of the facts of the case, and should determine the same after due consideration of all the evidence, in the light of attending circumstances, and the reasonableness and fair inferences to be drawn from the testimony, and in so doing you should act upon your own independent judgment, uninfluenced by what others, including the court, may think or say. *But I would be derelict in my duty if I did not say to you that, from my standpoint and viewpoint, this testimony irresistibly and irrefutably points to the absolute guilt of these defendant.*"

And the circuit court sustained this instruction.

In the case of *Beyer vs. U. S.*, C. C. A. 9th C., 251 Fed. 39, this court sustained, which goes no further than the present instruction by Judge Neterer.

Shea vs. U. S., 251 U. S. 445.

Sylvia vs. U. S., 264 Fed. 593.

Candle vs. U. S., 278 Fed. 710.

Balsom vs. U. S., 259 Fed. 779.

Perkins vs. U. S., 228 Fed. 408.

Allis vs. U. S., 155 U. S. 117, 123.

Lovejoy vs. U. S., 128 U. S. 171.

Soranners vs. U. S., 142 U. S. 148, 155.

Respectfully submitted,

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No. 4312

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

GLEN FULKERSON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

PETITION OF PLAINTIFF IN ERROR FOR REHEARING.

EDWARD H. CHAVELLE,
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Seattle, Washington,
Attorney for Plaintiff in Error.

No. 4312

IN THE

United States

Circuit Court of Appeals

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GLEN FULKERSON,

Plaintiff in Error,

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Defendant in Error.

PETITION FOR REHEARING.

Having carefully examined the opinion of the Honorable Court, I think that, with propriety, we may ask the Court to consider whether this case is not one in which it will be proper to grant a rehearing to the appellee, on the grounds:

E. The Court's instructions to the jury were, in part, an argument to them, when he stated that "If you believe that a man could be on the police force in Seattle for three years and have a flask like that passed on him, with that color of contents,—a man on the police force, and not knowing it was whiskey or prohibited spirits provided by the Volstead Law and the Prohibition

Amendment, then you must conclude that way, because it is for you to determine what the fact is. Now, I don't want you to conclude from any opinion you may think I have of the facts. I don't believe a word of it, myself; I believe he knew what was in the bottle."

This constitutes a dangerous precedent, if the trial court is permitted to argue to the jury on the facts, and if persisted in, would prevent a defendant from obtaining a trial by jury, the Court's argument being a closing for the Government, and an invasion of the duties of the prosecutor, with the jury weighing his very word, to be swayed and swerved from a consideration of all of the facts because of the emphasis the Court places on only the facts which are unfavorable to the defendant, and overlooking entirely those that are in his favor, precluding the jury from considering all of the evidence, but giving weight only to that which is emphasized by the Court.

2. The Court did not pretend to give a fair statement of the facts, but instead presented to the jury in his instructions, the Government's case, overlooking entirely the defense's testimony, and while it was not necessary for the Court to make a statement of the evidence to the jury, but if he was going to make a statement, and in conclusion express an opinion, the cases are agreed that it should be a fair statement of all the evidence, and not one that would favor either side, and this is particularly true where the facts are disputed as they were in this case, and where, as in this case,

the facts were in sharp conflict, the Court's statement of only certain of the facts to the jury of a part of the evidence, which was all in its character an argument, and with the statement that so far the testimony harmonized, and then the Court's proceeding to argue the case with the statement, that "If you believe that a man could be on the police force in Seattle for three years and have a flask like that passed to him, with that color of content,—a man on the police force, and not knowing it was whiskey or prohibited spirits provided by the Volstead Law and the Prohibition Amendment, then you must conclude that way, because it is for you to determine what the fact is. Now, I don't want you to conclude from any opinion you may think I have of the facts. I don't believe a word of it myself; I believe he knew what was in the bottle." The trial court did not only give the jury his opinion of the evidence, but argued to them the Government's case. It is the attempt to have the Court separate the law from the facts and leave the latter in unequivocal terms for the judgment of the jury as their true and peculiar province, and I can find no case supporting the Court arguing to the jury the facts peculiarly favorable to the Government.

Instead of the Court's instructions to the jury being submitted calmly and impartially, the instructions of the kind here complained of, were submitted with emphasis and vehemence, that creates an atmosphere that makes the instructions all one-sided, and that which makes in favor of the de-

fendant is not suggested as in this case, that the defendant happened to be in the premises in question, by reason of the fact that the defendant, while living with his family consisting of a wife and four children, at 322 Mercer Street and a member of the police force for three and a half years, had in addition to his occupation as a policeman, been working as a doorman at the Hipprodome; that he had rented the room in the apartment in question, for fifteen dollars a month, from a Mrs. Nulph, and that he did not know his codefendant, Mrs. Miller; that on the occasion in question, he had received a check for one-half month's pay from the police department, which, being short, the Captain told him to see the Commissioner and have it fixed; that he did so, and then went to his room to get his things; that on the first of the month he had started working nights, at which time his beat was changed to Washington Street in another neighborhood, and not convenient to the premises where he had rented the room; that his room rent had been paid up to the first of the month, but he had never taken his things away, and August 30th was the last time he had been there previous to his arrest; that on September 10th he went to the room only to get his clothes and things he had left there; that his wife, brother and sister were out in front of the building in a car waiting for him to return; that his things consisted of a uniform worn on the afternoon shift, and other clothing; that he had a key to the outside door, as had also the other tenants, there being

two or three in each flat; that while he was in the hall a woman, whom he afterwards ascertained to be Mrs. Miller, came from another room and said, "Here is this bottle of yours; it ought to be pretty good for your rheumatism," to which he replied, "I don't know anything about it," and that she looked at him and said, "Where did you come from?" to which the defendant responded, "I came from the lavatory," and she then said, "You just hand it to them," and she opened the door of the front room and defendant stepped in, where he found two men, and handed one of them the bottle, who gave the defendant some money and the defendant asked the man what it was for, and he replied, "For the bottle"; that the witness turned around to look for the girl, but that she was gone, and the men then said they were federal officers, and put the defendant under arrest. The defendant also denied the testimony of the two officers given against him, and said that the officers handed him a five dollar bill and said, "Here, give this to the girl."

In addition to the cases already cited in our brief, there is a recent case which has just been handed down by the Circuit Court of Appeals for the Eighth District, in Weare vs. United States, Vol. 1, 2d Ed. Fed. Rep. 617, which completely digests the question hereby presented. As to the question raised by the error assigned to certain portions of the charge of the Court on the ground that the same were argumentative, in part says:

"It is the well-established rule in the United States Courts that the Judge may comment on the evidence and may express his opinion on the facts, provided he clearly leaves to the jury the decision of fact questions. Little vs. United States (C. C. A.), 276 Fed. 915; Savage vs. United States (C. C. A.), 270 Fed. 14, Lovejoy vs. United States, 128 U. S. 171, 9 Sup. Ct. 57, 32 L. Ed. 389; Simmons vs. United States, 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968; Allis vs. United States, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91; Johnson vs. United States (C. C. A.), 270 Fed. 168; Oppenheim vs. United States, 241 Fed. 625, 154 C. C. A. 383; Dillon vs. United States (C. C. A.), 279 Fed. 639; Starr vs. United States, 153 U. S. 614, 14 Sup. Ct. 919, 38 L. Ed. 841; Horning vs. District of Columbia, 254 U. S. 135, 41 Sup. Ct. 53, 65 L. Ed. 185.

"The instructions, however, should not be argumentative. The Court cannot direct a verdict of guilty in criminal cases, even if the facts are undisputed. Dillon vs. United States (C. C. A.), 279 Fed. 639. It should not be permitted to do indirectly what it cannot do directly, and by its instructions to in effect argue the jury into a verdict of guilty. We refer to some of the decisions on this question.

"In Rudd vs. United States, 173 Fed. 912, 97 C. C. A. 462, this Court, in an opinion by

Judge Hook, referring to judges commenting on the evidence, said, 'His comments upon the facts should be judicial and dispassionate, and so carefully guarded that the jurors, who are the triers of them, may be left free to exercise their independent judgment.'

"In Sandals vs. United States, 213 Fed. 569, 576, C. C. A. 149, 156, the Court reversed the case and says: 'The jury is naturally sensitive to the Court's expression of opinion concerning the issues of fact in any case.'

"In Hickory vs. United States, 160 U. S. 408, 16 Sup. Ct. 327, 40 L. Ed. 474, the Court referred with approval to the doctrine of Starr vs. United States, *supra*, and stated there were certain limitations on the power of a federal Judge when instructing a jury and commenting on the facts, 'limitations inherent in and implied from the very nature of the judicial office.'

"In Reynolds vs. United States, 98 U. S. 145, 168 (25 L. Ed. 244), the Court said, 'Every appeal by the Court to the passions or the prejudices of a jury should be promptly rebuked; —it is the imperative duty of a reviewing court to take care that wrong is not done in this way.'

"In Foster vs. United States, 188 Fed. 305, 310, 110 C. C. A. 283, 288, the Court said: 'The greatest caution should be used in the exercise of this power.'

"In Mullen vs. United States, 106 Fed. 892, 46 C. C. A. 22, the thought was emphasized that the Court could only express its opinion on facts when based on evidence in the case. Other instances where the Court reversed the case on account of the language of the trial judge being argumentative are Breese vs. United States, 108 Fed. 804, 48 C. C. A. 36, and Cummins vs. United States, 232 Fed. 844, 147 C. C. A. 38. See also Garst vs. United States, 180 Fed. 339, 103 C. C. A. 469.

"In Stokes vs. United States (C. C. A.), 264 Fed. 18, 25, the question was raised that under the instructions of the Court defendant did not have a fair trial. This Court had before it the claimed unfair instructions, and in recognizing the right of trial judges in federal courts to comment upon the evidence, referred to the possibility of the Trial Court unconsciously so coloring its charge that the jury may be unfairly influenced in favor of one of the parties to the action, and said in holding the charge faulty: 'Where the line must be drawn between comment upon the evidence of facts which is and that which is not permissible indeterminable only by an examination of the language and a consideration of the circumstances of each particular case.'

"Examination of the language of the Court in its instructions in this case leads inevitably

to the conclusion that the exceptions and objections to certain parts thereof were well taken. In reading portions of the instructions, it would be difficult to tell whether one were reading the instructions of a court or the argument of a prosecutor. As a sample of their argumentative nature, we quote the following: 'As I recollect it, when these men were put in jail, one of them put in jail that day and the other one the day before, they were searched. Would such things as that match-box and that tobacco can escape the observation of the investigating officer? If he had any sense at all, wouldn't he have found those things? They wouldn't have to go into a man's shoes to determine whether he had a match-box on his person. If he had it in his shoe, he would have crushed it. They couldn't get that match-box in his shoe. That is my view. Would these things have escaped the searching officer when he searched them before they were put in jail that day? Now, they search them when they put them in jail.'

"Other remarks were made by the court equally objectionable, which it is not necessary to set out. The whole tenor of the instructions was apparently to influence the jury to return a verdict of guilty. It was a palpable attempt to usurp the function of the jury as to fact questions and to impose the will and desire of the

> Court upon it, and to interfere with the independent judgment of the jurors. Under the Constitution one accused of crime is entitled to a determination by a jury of the fact questions involved. The jury can easily be misled by the Court. Its members are sensitive to the opinion of the Court, and it is not a fair jury trial when the Court turns from legitimate instructions as to the law to argue the facts in favor of the prosecution. The Government provides an officer to argue the case to the jury. That is not a part of the Court's duty. He is not precluded, of course, from expressing his opinion of the facts, but he is precluded from giving a one-sided charge in the nature of an argument. *We do not think the error in this case is cured by the mere statement to the jury that they were not bound by his opinion, and that they should follow their own judgment.*

The case was reversed on account of the error in the instructions heretofore pointed out, affecting the substantial rights of the defendant, with directions to grant a new trial.

The Judge, in part, in his instructions in the present case said: "If his relation was that of proprietor in a broad sense; if the relation was as testified to by some of the witnesses on the part of the Government, that he was helping this woman out, who was a widow and has three or four children, and if you believe from all the circumstances and

the testimony developed here that the defendant was the real proprietor, and in possession of the premises, and if these liquors in the kitchen were really his possession, if he was *the directing mind,* —was the *controlling influence* and force with relation to the premises and of these liquors, then you would fine he was in possession of it all.

"Now, then, what is the testimony of the Government? The witnesses on the part of the Government say, that when they went in this Miller woman brought them in some drink, and then they asked for a flask, and she went out and said, 'Wait a minute'; went out with the partially filled flask, and then came back with the defendant; the defendant said, 'That is all right, $5.00 for the bottle and for the two drinks,' and gave the bottle to Mr. O'Hara and took the $5.00.

"Now, the defendant says that he was in the hall, that he did have his coat off, as the officers of the Government say he did; that he did come into the room with the bottle of whiskey in his hand; that he did deliver to one of these men the bottle, and did receive $5.00; now that far the testimony harmonizes. Now, he said that the woman gave it to him; he did not know what it was; told him to give it to the man, and he did it; then the officers came in and they found the $5.00 in his hand, just as the officers testified they did. Now, he was asked whether the bottle was wrapped up, he said no. He said he did not know what was in the bottle.

It is for you to determine the fact. Now if he was in the hall, and if this woman gave him the bottle and told him to deliver it to these men, and he did not know what was in the bottle, and gave it to the men, without knowing what was in the bottle, and got the $5.00 without knowing what was in the bottle, or what he was doing, if you believe that, then he is not guilty, because he didn't know what was in the bottle. If you believe that a man could be on the police force in Seattle for three years and have a flask like that passed to him with that color of contents,—a man on the police force, and not knowing it was whiskey or prohibited spirits provided by the Volstead Law and the Prohibition Amendment, then you must conclude that way, because it is for you to determine what the fact is. Now, I don't want you to conclude from any opinion you may think I have of the facts. *I don't believe a word of it myself. I believe he knew what was in the bottle.*"

The Court, while precluding any statement of the evidence of the defendant as to how he came to be in the place at that particular time and the circumstances under which he was there, and an explanation of his conduct, argued to the jury that the defendant must be guilty.

The learned Judge's instructions stated, that "When courts cease to function properly, then God have mercy upon the people of the United States. Law is a rule of civil conduct prescribed by a su-

perior power, and persons must regulate their conduct with relation to that law. It is a rule by which people shall live, and when they violate that rule why then they must be punished; that is the only way we can have Government, and when courts and juries won't function it will only be a short step to a condition of anarchy. If you believe that the defendant went on the stand and perjured himself with a view of escaping a penalty, you will so conclude." And this in connection with the Court's statement as to not merely what the Judge thought the evidence showed, but certain things he stated as absolute facts, and by the way of argument, which had no other effect than to influence the verdict of the jury.

Finally, I respectfully request that the Court again consider the cases cited in our brief, together with the recent case herein cited.

WHEREFORE, upon the foregoing grounds, this appellee and petitioner respectfully prays this Honorable Court to grant to him a rehearing of said cause.

EDWARD H. CHAVELLE,
Attorney for Appellee and Petitioner.

I, Edward H. Chavelle, counsel for the appellee herein, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that the same is not interposed for delay.

EDWARD H. CHAVELLE.